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HARVARD  
LAW REVIEW

VOL. XIII.  
1899-1900



CAMBRIDGE, MASS.  
THE HARVARD LAW REVIEW PUBLISHING ASSOCIATION  
1900



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THE UNIVERSITY PRESS, CAMBRIDGE, MASS., U. S. A.



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# HARVARD LAW REVIEW.

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VOL. XIII.

APRIL 25, 1899.

No. 1

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## THE TENURE OF JUDICIAL OFFICE.

A VERY striking passage in the fine address of Joseph H. Choate in the Court House in Boston, on the occasion of unveiling the statue of Rufus Choate, on October 15 last, has drawn attention to the speech of the distinguished man then commemorated on the tenure of judicial office, in the Massachusetts Constitutional Convention of 1853. The tribute to that speech and to the doctrine which it advocated, paid by the distinguished New York advocate, was all the more impressive when one remembers that he has practised all his life under an elective judiciary. His fervent and solemn admonition to the lawyers of his native State to maintain their own system, comes therefore from an expert of the highest authority, not merely as regards general forensic experience, but also as touching a knowledge and observation of both the systems in question; for his practice before the Federal Courts has been only less extensive than his State practice.

It has seemed well to reproduce and make accessible both the original address and the remarks of Mr. Joseph Choate about it. It is not an inappropriate moment to reconsider this subject when the grievous miscarriage in the State of Minnesota last autumn is still fresh in men's minds, — whereby the electors, out of the mere excess of party spirit, refused a re-election to the Supreme Court to the ablest judge upon that bench, a judge of very distinguished capacity, hardly second to any judge on any bench in this country, Mr. Justice Mitchell. Mr. Joseph H. Choate said: —

"I regard the magnificent argument which he made on judicial tenure in the Constitutional Convention of 1853 as the greatest single service which he ever rendered to the profession, and to the Commonwealth of which he was so proud. You will observe, if you read it, that it differs radically in kind, rather than in degree, from all his other speeches, arguments and addresses.

"Discarding all ornament, restraining with careful guard all tendency to flights of rhetoric, in clear and pellucid language, plain and unadorned, laying bare the very nerve of his thought, as if he were addressing, as no doubt he meant to address and convince, not alone his fellow delegates assembled in the Convention, but the fishermen of Essex, the manufacturers of Worcester and Hampden, and the farmers of Berkshire, aye, all the men and women of the Commonwealth, of that day and of all days to come, he pleads for the continuance of an appointed judiciary, and for the judicial tenure during good behavior, as the only safe foundations of justice and of liberty.

"He draws the picture of 'a good judge profoundly learned in all the learning of the law;' 'not merely upright and well intentioned;' 'but the man who will not respect persons in judgment;' standing only for justice, 'though the thunder should light upon his brow,' while he holds the balance even to protect the humblest and most odious individual against all the powers and the people of the Commonwealth; and 'possessing at all times the perfect confidence of the community, that he bear not the sword in vain.' He stands for the existing system which had been devised and handed down by the Founders of the State, and appeals to its uniform success in producing just that kind of a judge; to the experience and example of England since 1688; to the Federal system which had furnished to the people of the Union such illustrious magistrates; and finally to the noble line of great and good judges who had from the beginning presided in your courts. He then takes up and disposes of all objections and arguments drawn from other States which had adopted an elective judiciary and shortened terms, and conclusively demonstrates that to abide by the existing Constitution of your judicial system, was the only way to secure to Massachusetts forever 'a government of laws and not of men.'

"It was on one of the red-letter days of my youth that I listened to that matchless argument, and when it ended, and the last echoes of his voice died away as he retired from the old Hall of the House



of Representatives, leaning heavily upon the arm of Henry Wilson all crumpled, dishevelled and exhausted, I said to myself that some virtue had gone out of him — indeed some virtue did go out of him with every great effort — but that day it went to dignify and ennoble our profession, and to enrich and sustain the very marrow of the Commonwealth. If ever again that question should be raised within her borders, let that argument be read in every assembly, every church and every school-house. Let all the people hear it. It is as potent and unanswerable to-day, and will be for centuries to come, as it was nearly half a century ago when it fell from his lips. Cling to your ancient system, which has made your Courts models of jurisprudence to all the world until this hour. Cling to it, and freedom shall reign here until the sunlight shall melt this bronze, and justice shall be done in Massachusetts, though the skies fall."

The speech of Rufus Choate was made on July 14, 1853, and is found in the "Addresses and Orations of Rufus Choate" (Boston: Little, Brown, and Co. 1878). We reproduce it with the consent of the publishers and the owners of the copyright. It may be found also in the second volume of the "Life and Works of Rufus Choate," by Professor Brown, and at p. 799 of the second volume of "The Debates in the Constitutional Convention," of 1853, published by the State of Massachusetts in that year. Mr. Choate said: —

"It is not my purpose to enter at large on the discussion of this important subject. That discussion is exhausted; and if it is not, your patience is; and if not quite so, you have arrived, I apprehend, each to his own conclusion. But as I had the honor to serve on the committee to whom the department of the judiciary was referred, I desire to be indulged in the statement of my opinions abstaining from any attempt elaborately to enforce them.

"I feel no apprehension that this body is about to recommend an election of judges by the people. All appearances; the votes taken; the views disclosed in debate; the demonstrations of important men here, indicate the contrary. I do not mean to say that such a proposition has not been strenuously pressed, and in good faith; yet, for reasons which I will not consume my prescribed hour in detailing, there is no danger of it. Whether members are ready for such a thing or not, they avow, themselves, that they do not think the people are ready.

"What I most fear is, that the deliberation may end in limiting

the tenure of judicial office to a term of years, seven or ten; that in the result we shall hear it urged, 'as we are good enough not to stand out for an election by the people, you ought to be capable of an equal magnanimity, and not stand out for the present term of good behavior;' and thus we shall be forced into a compromise in favor of periodical and frequent appointment, — which shall please everybody a little.

"I have the honor to submit to the convention that neither change is needed. Both of them, if experience may in the least degree be relied on, are fraught with evils unnumbered. To hazard either, would be, not to realize the boast that we found the capitol, in this behalf, brick, and left it marble; but contrariwise, to change its marble to brick.

"Sir, in this inquiry what mode of judicial appointment, and what tenure of judicial office, you will recommend to the people, I think that there is but one safe or sensible mode of proceeding, and that is to ascertain what mode of appointment, and what length and condition of tenure, will be most certain, in the long run, guiding ourselves by the lights of all the experience and all the observation to which we can resort, to bring and keep the best judge upon the bench — the best judge for the ends of his great office. There is no other test. That an election by the people, once a year, or an appointment by the governor once a year, or once in five, or seven, or ten years, will operate to give to an ambitious young lawyer (I refer to no one in this body) a better chance to be made a judge — as the wheel turns round — is no recommendation, and is nothing to the purpose. That this consideration has changed, or framed, the constitutions of some of the States whose example has been pressed on us, I have no doubt. Let it have no weight here. We, at least, hold that offices, and most of all the judicial office, are not made for incumbents or candidates, but for the people; to establish justice; to guarantee security among them. Let us constitute the office in reference to its ends.

"I go for that system, if I can find it or help find it, which gives me the highest degree of assurance, taking man as he is, at his strongest and at his weakest, and in the average of the lot of humanity, that there shall be the best judge on every bench of justice in the commonwealth, through its successive generations. That we may safely adopt such a system; that is to say, that we may do so and yet not abridge or impair or endanger our popular polity in the least particular; that we may secure the best possible



judge, and yet retain, ay, help to perpetuate and keep in health, the utmost affluence of liberty with which civil life can be maintained, I will attempt to show hereafter. For the present, I ask, how shall we get and keep the best judge for the work of the judge?

“Well, Sir, before I can go that inquiry, I must pause at the outset, and, inverting a little what has been the order of investigation here, ask first, who and what is such a judge; who is that best judge? what is he? how shall we know him? On this point it is impossible that there should be the slightest difference of opinion among us. On some things we differ. Some of you are dissatisfied with this decision or with that. Some of you take exception to this judge or to that. Some of you, more loftily, hold that one way of appointing to the office, or one way of limiting the tenure, is a little more or less monarchical, or a little more or less democratic than another — and so we differ; but I do not believe there is a single member of the convention who will not agree with me in the description I am about to give of the good judge; who will not agree with me that the system which is surest to put and to keep him on the bench is the true system for Massachusetts.

“In the first place, he should be profoundly learned in all the learning of the law, and he must know how to use that learning. Will any one stand up here to deny this? In this day, boastful, glorious for its advancing popular, professional, scientific, and all education, will any one disgrace himself by doubting the necessity of deep and continued studies, and various and thorough attainments, to the bench? He is to know, not merely the law which you make, and the legislature makes, not constitutional and statute law alone, but that other ampler, that boundless jurisprudence, the common law, which the successive generations of the State have silently built up; that old code of freedom which we brought with us in *The Mayflower* and *Arabella*, but which in the progress of centuries we have ameliorated and enriched, and adapted wisely to the necessities of a busy, prosperous, and wealthy community, — that he must know. And where to find it? In volumes which you must count by hundreds, by thousands; filling libraries; exacting long labors, — the labors of a lifetime, abstracted from business, from politics; but assisted by taking part in an active judicial administration; such labors as produced the wisdom and won the fame of Parsons and Marshall, and Kent and Story, and Holt and Mansfield. If your system of appointment and tenure

does not present a motive, a help for such labors and such learning; if it disparages them, in so far it is a failure.

"In the next place, he must be a man, not merely upright, not merely honest and well intentioned, — this of course, — but a man who will not respect persons in judgment. And does not every one here agree to this also? Dismissing, for a moment, all theories about the mode of appointing him, or the time for which he shall hold office, sure I am, we all demand that, as far as human virtue, assisted by the best contrivances of human wisdom, can attain to it, he shall not respect persons in judgment. He shall know nothing about the parties, everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; nothing for his sovereign. If on one side is the executive power and the legislature and the people, — the sources of his honors, the givers of his daily bread, and on the other an individual nameless and odious, his eye is to see neither, great nor small; attending only to the 'trepidations of the balance.' If a law is passed by a unanimous legislature, clamored for by the general voice of the public, and a cause is before him on it, in which the whole community is on one side and an individual nameless or odious on the other, and he believes it to be against the Constitution, he must so declare it, — or there is no judge. If Athens comes there to demand that the cup of hemlock be put to the lips of the wisest of men; and he believes that he has not *corrupted the youth, nor omitted to worship the gods of the city, nor introduced new divinities of his own*, he must deliver him, although the thunder light on the unterrified brow.

"This, Sir, expresses, by very general illustration, what I mean when I say I would have him no respecter of persons in judgment. How we are to find, and to keep such an one; by what motives; by what helps; whether by popular and frequent election, or by executive designation, and permanence dependent on good conduct in office alone — we are hereafter to inquire; but that we must have him, — that his price is above rubies, — that he is necessary, if justice, if security, if right are necessary for man, — all of you from the East or West, are, I am sure, unanimous.

"And, finally, he must possess the perfect confidence of the community, that he bear not the sword in vain. To be honest, to be no respecter of persons, is not yet enough. He must be believed such. I should be glad so far to indulge an old-fashioned and cherished professional sentiment as to say, that I would have



something of venerable and illustrious attach to his character and function, in the judgment and feelings of the commonwealth. But if this should be thought a little above or behind the time, I do not fear that I subject myself to the ridicule of any one, when I claim that he be a man towards whom the love and trust and affectionate admiration of the people should flow; not a man perching for a winter and summer in our court-houses, and then gone forever, but one to whose benevolent face, and bland and dignified manners, and firm administration of the whole learning of the law, we become accustomed: whom our eyes anxiously, not in vain, explore when we enter the temple of justice; towards whom our attachment and trust grow even with the growth of his own eminent reputation. I would have him one who might look back from the venerable last years of Mansfield, or Marshall, and recall such testimonies as these to the great and good Judge: —

“‘The young men saw me, and hid themselves; and the aged arose and stood up.

“‘The princes refrained talking, and laid their hand upon their mouth.

“‘When the ear heard me, then it blessed me, and when the eye saw me, it gave witness to me.

“‘Because I delivered the poor that cried, and the fatherless, and him that had none to help him.

“‘The blessing of him that was ready to perish came upon me, and I caused the widow’s heart to sing for joy.

“‘I put on righteousness and it clothed me. My judgment was as a robe and a diadem. I was eyes to the blind, and feet was I to the lame.

“‘I was a father to the poor, and the cause which I knew not I searched out.

“‘And I brake the jaws of the wicked, and plucked the spoil out of his teeth.’

“Give to the community such a judge, and I care little who makes the rest of the constitution, or what party administers it. It will be a free government, I know. Let us repose, secure, under the shade of a learned, impartial, and trusted magistracy, and we need no more.

“And, now, what system of promotion to office and what tenure of office is surest to produce such a judge? Is it executive appointment during good behavior, with liability, however, to be impeached for good cause, and to be removed by address of the

legislature? or is it election by the people, or appointment by the executive for a limited term of years?

"To every system there are objections. To every system there are sound, or there are spacious objections; objections of theory; objections of fact. Any man's ability is equal to finding, and exaggerating them. What is demanded of us is to compare the good and evil of the different systems, and select the best. Compare them by the test which I have proposed. See which will most certainly give you the judge you need, and adopt that. It may be cavilled at; even as freedom, as religion, as wholesome restraint, as liberty of speech, as the institution and the rights of property, may be cavilled at; but in its fruits, in its product, judged by a long succession of seasons, is its justification and its glory.

"Applying then, Sir, this test, I think the existing system is, out of all comparison, the best one. At the hazard of repeating and weakening the views presented yesterday in the impressive and admirable address of my friend for Manchester, [Mr. Dana,] and in the instructive and able arguments of the two gentlemen, [Mr. Greenleaf and Mr. Parker,] whose established professional reputations gives to them such just weight with you, I beg to submit, briefly, why I think so.

"In the first place, then, it seems to me most clear that the weight of sound general opinion and of the evidence of a trustworthy experience vastly preponderates in favor of it. How the system of popular elections, or of short terms, is actually working now in any one of the States which have recently introduced it; how, still more, it is likely to work there after the influences of the earlier system, the judges which it bred, the habits which it formed, the bars which it trained, have passed away, there is no proof before this Convention deserving one moment's notice. We do not know what is the predominant conviction on this subject, to-day, of those fittest to judge, in any one State. We do know that they cannot yet possibly pronounce on the matter, however close or sagacious their observation. What they have not yet seen, they cannot yet tell. Certainly the result of all that I have been able to gather is a general and strong opinion against the new system; and in favor of a return, if to return were possible, to that which we are yet proud and privileged to call our own. But the evidence is too loose for the slightest consideration. My friend for Manchester read letters yesterday from persons of high character, as he assured us, in New York, deploring the working of her new system; and I



have no doubt that the witnesses are respectable, and the opinions perfectly sound. But other gentlemen guess that very different letters might be obtained, by applying to the right quarters; and the gentlemen from New Bedford, [Mr. French,] is quite confident that the people of that great State—the two or three millions—are in favor of the change, because one, if not two, or even three individuals have personally told him so. And, therefore, I say, we have not here now so much evidence of the practical working of their recent systems anywhere, even as far as it has gone, that any honest lawyer would advise his client to risk a hundred dollars on it.

“But on the other hand, are there not most weighty opinions; is there not the testimony of the widest, and longest, and most satisfactory experience, that executive appointment for good behavior yield the best judge?

“What is British opinion and British experience to the point? On the question what tenure of office promises the best judge, that opinion and that experience may well be averted to. Whether a particular mode, or a particular tenure, is consonant to the republican polity of government, we must settle for ourselves. That is another question. Monarchical and aristocratical principles we will not go for to England or elsewhere, nor buy even learning, impartiality, and titles to trust, at the cost of an anti-republican system. But to know how it practically operates to have the judge dependent on the power that appoints him; dependent for his continuance in office; dependent for his restoration to it; dependent on anything or on anybody but his own official good behavior, and that general responsibility to the legislature and public opinion, ‘that spirit of observation and censure which modifies and controls the whole government,’—we may very well consult British or any other experience. The establishment of the tenure of good behavior was a triumph of liberty. It was a triumph of popular liberty against the crown. Before the revolution of 1688, or certainly during the worst years of the Stuart dynasty, the judge held office at the pleasure of the king who appointed him. What was the consequence? He was the tool of the hand that made and unmade him. Scroggs and Jeffreys were but representatives and exemplifications of a system. A whole bench sometimes was packed for the enforcement of some new and more flagrant royal usurpation. Outraged and in mourning by judicial subserviency and judicial murder, England discerned at the revolution that her

liberty was incompletely recovered and imperfectly guarded, unless she had judges by whom the boast that an Englishman's house is his castle should be elevated from a phrase to a fact; from an abstract right to secure enjoyment, so that, although that house were 'a cottage with a thatched roof which all the winds might enter, the king could not.' To that end the Act of settlement made the tenure of good behavior a part of the British Constitution; and a late amendment kept the judicial commission alive, as my friend from Manchester yesterday reminded us, notwithstanding the demise of the sovereign, and perfected the system. Sir, the origin of the tenure of good behavior — marking thus an epoch in the progress of liberty; a victory, so to say, of individuality, of private right, of the household hearth of the cottager, of the 'swink'd hedger,' over the crown, — and still more, its more practical workings in the judicial character and function, may well entitle it to thoughtful treatment. Compare the series of British judges since 1688 with that before, and draw your own conclusions. Not that all this improvement, in impartiality, in character, in titles to confidence and affection is due to the change of tenure; but the soundest historians of that Constitution recognize that that is one element of transcendent importance. With its introduction she began to have a government of laws and not men.

"I come to other testimony, other opinions — the lights of a different experience. There is a certain transaction and document called the Federal Constitution. Consult that. In 1787, that Convention, — assisted by the thoughts and discussions of the five years of peace preceding it, upon the subject of national government, — to be constructed on the republican form of polity — into which were gathered all, or almost all, of our great men, in our age of greatness; men of deep studies, ripe wisdom, illustrious reputation, a high spirit of liberty; that Convention, upon a careful survey of the institutions of the States of America, and of those of other countries, and times past and present; upon, I think we cannot doubt, a profound appreciation of the true functions of a judicial department; of the qualities of a good judge; of the best system of appointment and tenure to obtain them — of the true nature of republican government — and how far, consistently with all its characteristic principles and aims, the people may well determine to appoint to office indirectly, rather than directly, and for good behavior, rather than for a limited term, when the great ends of the stability of justice, and the security of private right



prescribe it — incorporated into the great organic law of the Union the principle that judges shall be appointed by the executive power, to hold their office during good behavior.

“The gentleman from Lowell [Mr. Butler] last evening observed, referring, I believe, to the time when our Constitution was adopted, that it was long before the age of the steamboat and railroad and magnetic telegraph. It is true; but do we know better than they knew the nature of man; the nature of the judicial man; what he ought to be to discharge his specific functions aright; how motives, motives of ambition, of fear, of true fame, of high principle, affect him; whether dependence on another power is favorable to independence of the wishes and the will of that other power? Do we know more of republican government and true liberty, and the reconciliations of personal security under due course of law with the loftiest spirit of freedom, than they? Has the advancement of this kind of knowledge quite kept pace with that of the science of the material world?

“I wish, Sir, the time of the Convention would allow me to read entire that paper of ‘The Federalist,’ the seventy-eighth I believe, in which the principle of the independence of the judiciary is vindicated, and executive appointment, during good behavior, as the means of attaining such independence, is vindicated also. But read it for yourselves. Hear Hamilton and Madison and Jay; for we know from all sources that on this subject that paper expressed the opinions of all, — on the independence of the judiciary, and the means of securing it, — a vast subject adequately illustrated by the highest human intelligence and learning and purity of principle and of public life.

“Sir, it is quite a striking reminiscence that this very paper of ‘The Federalist,’ which thus maintains the independence of the judiciary, is among the earliest, perhaps the earliest, enunciation and vindication, in this country, of that great truth, that in the American politics, the written Constitution — which is the record of the popular will — is above the law which is the will of the legislature merely; that if the two are in conflict, the law must yield and the Constitution must rule; and that to determine whether such a conflict exists, and if so, to pronounce the law invalid, is, from the nature of the judicial office, the plain duty of the judge. In that paper this fundamental proposition of our system was first presented, or first elaborately presented, to the American mind; its solidity and its value were established by unanswerable reasoning;

and the conclusion that a bench, which was charged with a trust so vast and so delicate, should be as independent as the lot of humanity would admit — of the legislature, of the executive, of the temporary popular majority, whose will it might be required thus to subject to the higher will of the Constitution, was deduced by a moral demonstration. Beware, Sir, lest truth so indissolubly connected — presented together, at first; — adopted together — should die together. Consider whether, when the judge ceases to be independent, the Constitution will not cease to be supreme. If the Constitution does not maintain the judge against the legislature, and the executive, will the judge maintain the Constitution against the legislature and the executive?

“What the working of this principle in the national government has been practically, there is no need to remind you. Recall the series of names, the dead and living, who have illustrated that Bench; advert to the prolonged terms of service of which the country has had the enjoyment; trace the growth of the national jurisprudence; compare it with any other production of American mind or liberty; then trace the progress and tendencies of political opinions, and say if it has not given us stability and security, and yet left our liberties unabridged.

“I find a third argument for the principle of executive appointment during good behavior in this: that it is the existing system in Massachusetts, and it has operated with admirable success. It is not that it exists; it is that it works well. Does it not? Sir, is it for me, or any man, any member of the profession of the law most of all, to rise here, and now, and because our feelings may have sometimes been ruffled or wounded by a passage with the Bench; because we have been dissatisfied by a ruling or a verdict; because our own overwrought brain may have caused us, in some moment, to become forgetful of ourselves; or because a judge may have misunderstood us, and done us an unintentional injury — is it for us to disclaim the praise, so grateful, so just, which the two eminent gentlemen, one of them formerly of New Hampshire [Mr. Parker], one of them formerly of Maine [Mr. Greenleaf], speaking without the partiality of native sons, and from observations made by them from a point of view outside of us, and distant from us — have bestowed on our Bench and our law? Theirs are lips from which even flattery were sweet; but when they concur in reminding you with what respect the decisions of this court are consulted by other courts of learning and character; how far their



reputation has extended; how familiar is the profession of law with the great names of our judicial history; how important a contribution to American jurisprudence, and even to the general products of American thought, our local code composes — do we not believe that they utter their personal convictions, and that the high compliment is as deserved as it is pleasing?

“It has worked well, it is good. Do men gather grapes of thorns, or figs of thistles? If it has continued to us a long succession of men, deeply learned, wholly impartial, deserving, and clothed with the trust, love, and affectionate admiration of all parties of the community, does it not afford a reasonable ground of inference that there is something in such a mode of appointment, and in such a tenure, *intrinsically, philosophically* adapted to insure such a result?

“Some criticism has been made on the practical administration of our law, which deserves a passing notice. It requires the less because it has already been replied to.

“The gentleman from New Bedford [Mr. French] told a story of some one, as I understood him, who was about to lose, or had lost, or dared not sue, a note of a hundred dollars, because it would cost him one hundred and fifty dollars to collect it. A very sensible explanation was suggested by the gentleman from Cambridge [Mr. Parker] just now; and I will venture to advise the gentleman from New Bedford in addition, the very first time he sees his friend, to recommend to him to change his lawyer as quickly as he possibly can. As a reason for a change of the Constitution, and the tenure of the judicial office, it seems to me not particularly cogent.

“The same gentleman remembers that your Supreme Court decided that the fugitive-slave-law is constitutional; and what makes it the more provoking is, he knows the decision was wrong. Well, Sir, so said the gentleman from Manchester [Mr. Dana]. His sentiments concerning that law and its kindred topics do not differ, I suppose, greatly from those of the member from New Bedford; but what did he add? ‘I thank God,’ he said, ‘that I have the consolation of knowing the decision was made by men as impartial as the lot of humanity would admit; and that if judges were elected by the people of Massachusetts it would hold out no hope of a different decision.’ He sees in this, therefore, no cause for altering our judicial system on any view of the decision; and I believe — though I have never heard him say or suggest such a

thing — that my friend's learning and self-distrust — that 'that learned and modest ignorance' which Gibbon recognizes as the last and ripest result of the profound knowledge of a large mind — will lead him to agree with me, that it is *barely possible*, considering how strongly that law excites the feelings, and thus tends to disturb the judgment, considering the vast weight of judicial opinion, and of the opinions of public persons in its favor; recalling the first law on that subject, and the decision in Prigg and Pennsylvania — and who gave the opinion of that Court in that case — that it is *just barely possible* that the gentleman from New Bedford does not certainly know that the decision was wrong. That he thinks it so, and would lay his life down upon it, the energy and the sentiments of his speech sufficiently indicate. My difficulty, like my friend's from Manchester, is to gather out of all this indignation the least particle of cause for a change of the judicial tenure.

"The gentleman from Lowell [Mr. Butler] animadverted somewhat, last evening, on the delays attending the publication of the reports of decisions. I had made some inquiry concerning the facts, but have been completely anticipated in all I would have said by the gentleman from Cambridge [Mr. Parker]. To me his explanation seems perfectly satisfactory; and in no view of such a question would the good sense of the gentleman from Lowell, I think, deem it a reason for so vast an innovation as this, on the existing and ancient system.

"To another portion of that learned gentleman's speech, I have a word to say, in all frankness and all candor. Placing his hand on his heart, he appealed, with great emphasis of manner, to the honor of the bar as represented in this Convention, whether we had not heard complaints of particular acts of some of our judges? Sir, that appeal is entitled to a frank and honorable response. I have known and loved many; many men; many women — of the living and the dead — of the purest and noblest of earth or skies — but I never knew one — I never heard of one — if conspicuous enough to attract a considerable observation, whom the breath of calumny, or of sarcasm, always wholly spared. Did the learned gentleman ever know one? 'Be thou as chaste as ice, as pure as snow, thou shalt not escape calumny.'

"And does he expect that in a profession like ours; overtaken; disappointed in the results of causes; eager for victory; mortified by unexpected defeat; misunderstanding or failing to appreciate



the evidence; the court sometimes itself jaded and mistaken — that we shall not often hear, and often say hasty and harsh things of a judge? I have heard such of every judge I ever saw — however revered in his general character. Did Mansfield escape? Did Marshall? Did Parsons? Did Story? What does it come to as an argument against the particular judge; still more as an argument against a judicial system? Are we to go on altering the mode of appointment, and the tenure, till you get a *corps* of judges against no one of which, no one ever hears anybody say anything?

“But, Sir, I am to answer the learned gentleman’s appeal a little farther; and I say upon my honor, that I believe it the general opinion of the bar to-day, its general opinion ever since I entered the profession, that our system of appointment and tenure has operated perfectly well; that the benches and courts have been, and are, learned, impartial, entitled to trust; and that there is not one member of either who, taking his judicial character and life as a whole, is not eminently, or adequately, qualified for his place.

“Turn, now, from the existing system to the substitute which is offered; and see, if you can, how that will work.

“It is not enough to take little objections to that system, in its general working so satisfactory. He who would change it is bound to show that what he proposes in place of it, will do better. To this, I say, it is all a sheer conjectural speculation, yet we see and know enough to warrant the most gloomy apprehensions.

“Consider first, for a moment, the motion immediately pending; which proposes the election of judges by the people. I said in the outset, I have no fear of your sustaining it; but for the development of a full view of the general subject, it will justify some attention.

“Gentlemen begin by asking if we are afraid to trust the people. Well, Sir, that is a very cunning question; very cunning indeed. Answer it as you will, they think they have you. If you answer, Yes, — that you are afraid to trust the people, — then they cry out, He blasphemeth. If you answer, No, — that you are not afraid to trust them, — then they reply, Why not permit them to choose their judges?

“Sir, this dilemma creates no difficulty. I might evade it by saying that however ready and however habituated to trust the people, it does not follow that we should desert a system which has succeeded eminently, to see if another will not succeed as well. If

the indirect appointment by the people, appointment through the governor whom they choose, has supplied a succession of excellent judges, why should I trouble them with the direct appointment — however well they might conduct it — which they have not solicited; which they have not expected; about which you dared not open your mouths during the discussion concerning the call of a Convention: in regard to which you gave them — it is more correct to say — every reason to believe you should make no change whatever? Get a Convention by a pledge to the people not to make judges elective — and then tell us we shall make them elective, on pain of being denounced afraid to trust the people! Will such flattery be accepted in atonement for such deception?

“But I prefer meeting this dilemma in another way. It is a question certainly of some nicety to determine what offices the public good prescribes should be filled by direct election of the people; and what should be filled by the appointment of others, as the governor and council, chosen by the people. On the best reflection I have been able to give it, this seems to me a safe general proposition. If the nature of the office be such, the qualifications which it demands, and the stage on which they are to be displayed be such, that the people can judge of those qualifications as well as their agents; and if, still farther, the nature of the office be such that the tremendous ordeal of a severely contested popular election will not in any degree do it injury, — will not deter learned men, if the office needs learning, from aspiring to it; will not tend to make the successful candidate a respecter of persons, if the office requires that he should not be; will not tend to weaken the confidence and trust, and affectionate admiration of the community towards him, if the office requires that such be the sentiments with which he should be regarded, — then the people should choose by direct election. If, on the other hand, from the kind of qualifications demanded, and the place where their display is to be made, an agent of the people, chosen by them for that purpose, can judge of the qualifications better than they can; or if from its nature it demands learning, and the terrors of a party canvass drive learning from the field; or if it demands impartiality and general confidence and the successful candidate of a party is less likely to possess either, — then the indirect appointment by the people, that is, appointment by their agent, is wisest.

“Let me illustrate this test by reference to some proceedings of the Convention. You have already made certain offices elective,



which heretofore were filled by executive appointment—such as those of sheriffs; the attorney-general; district-attorneys, and others.

“Now, within the test just indicated, I do not know why these offices may not be filled by election, if anybody has a fancy for it. Take the case of the sheriff, for instance. He requires energy, courtesy, promptness, — qualities pertaining to character rather, and manner, displayed, so to speak, in the open air; palpable, capable of easy and public appreciation. Besides, his is an office which the freedom and violence of popular elections do not greatly harm. There are certain specific duties to do for a compensation, and if these are well done, it does not much signify what a minority or what anybody thinks of him.

“Totally unlike this in all things is the case of the judge. In the first place, the qualities which fit him for the office are quite peculiar; less palpable, less salient, so to speak, less easily and accurately appreciated by cursory and general notice. They are an uncommon, recondite, and difficult learning, and they are a certain power and turn of mind and cast of character, which, until they come actually, and for a considerable length of time, and in many varieties of circumstances, to be displayed upon the bench itself, may be almost unremarked but by near and professional observers. What the public chiefly see is the effective advocate; him their first thought would be perhaps to make their candidate for judge; yet experience has proved that the best advocate is not necessarily the best judge, — that the two functions exact diverse qualifications, and that brilliant success in one holds out no certain promise of success in the other. A popular election would have been very likely to raise Erskine or Curran to the Bench, if they had selected the situation; but it seems quite certain that one failed as Lord Chancellor, and the other as master of the Rolls, and pretty remarkably, too, considering their extraordinary abilities in the conduct of causes of fact at the bar. I have supposed that Lord Abinger, who, as Mr. Scarlett, won more verdicts than any man in England, did not conspicuously succeed in the exchequer; and that, on the other hand, Lord Tenterden, to name no more, raised to the bench from no practice at all, or none of which the public had seen anything, became, by the fortunate possession of the specific judicial nature, among the most eminent who have presided on it. The truth is, the selection of a judge is a little like that of a professor of the higher mathematics

or of intellectual philosophy. Intimate knowledge of the candidate will detect the presence or the absence of the *specialty* demanded; the kind of knowledge of him which the community may be expected to gain, will not. On this point I submit to the honor and candor of the bar in this body an illustration which is worth considering. It often happens that our clients propose, or that we propose, to associate other counsel with us to aid in presenting the cause to the jury. In such cases we expect and desire them to select their man, and almost always we think the selection a good one. But it sometimes happens, too, that it is decided to submit the cause to a lawyer as a referee. And then do we expect or wish our client to select the referee? Certainly never. That we know we can do better than he, because better than he we appreciate the legal aspects of the case, and the kind of mind which is required to meet them; and we should betray the client, sacrifice the cause, and shamefully neglect a clear duty, if we did not insist on his permitting us, for the protection of his interests intrusted to our care, to appoint his judge. Always he also desires us for his sake to do it. And now, that which we would not advise the single client to do for himself, shall we advise the whole body of our clients to do for themselves?

“But this is by no means the principal objection to making this kind of office elective. Consider, beyond all this, how the office itself is to be affected; its dignity; its just weight; the kind of men who will fill it; their learning; their firmness; their hold on the general confidence—how will these be affected? Who will make the judge? At present he is appointed by a governor, his council concurring, in whom a majority of the whole people have expressed their trust by electing him, and to whom the minority have no objection but his politics; acting under a direct personal responsibility to public opinion; possessing the best conceivable means to ascertain, if he does not know, by inquiry at the right sources, who does, and who does not possess the character of mind and qualities demanded. By such a governor he is appointed; and then afterward he is perfectly independent of him. And how well the appointing power in all hands has done its work, let our judicial annals tell. But, under an elective system, who will make the judge? The young lawyer leaders in the caucus of the prevailing parties will make him. Will they not? Each party is to nominate for the office, if the people are to vote for it, is it not? You know it must be so. How will they nominate? In the great



State caucus, of course, as they nominate for governor. On whom will the judicial nominations be devolved? On the professional members of the caucus, of course. Who will they be? Young, ambitious lawyers, very able, possibly, and very deserving; but not selected by a majority of the whole people, nor by a majority, perhaps, of their own towns, to do anything so important and responsible as to make a judge,—these will nominate him. The party, unless the case is very scandalous indeed, will sustain its regular nominations; and thus practically a handful of caucus leaders, under this system, will appoint the judges of Massachusetts. This is bad enough; because we ought to know who it is that elevates men to an office so important—we ought to have some control over the nominating power—and of these caucus leaders we know nothing; and because, also, they will have motives to nominate altogether irrespective of the fitness of the nominee for the place, on which no governor of this Commonwealth, of any party, has ever acted. This is bad enough. But it is not all, nor the worst. Trace it onwards. So nominated, the candidate is put through a violent election; abused by the press, abused on the stump, charged ten thousand times over with being very little of a lawyer, and a good deal of a knave or boor; and after being tossed on this kind of blanket for some uneasy months, is chosen by a majority of ten votes out of a hundred thousand, and comes into court, breathless, terrified, with perspiration in drops on his brow, wondering how he ever got there, to take his seat on the bench. And in the very first cause he tries, he sees on one side the counsel who procured his nomination in caucus, and has defended him by pen and tongue before the people, and on the other, the most prominent of his assailants; one who has been denying his talents, denying his learning, denying his integrity, denying him every judicial quality and every quality that may define a good man, before half the counties in the state. Is not this about as infallible a recipe as you could wish to make a judge a respecter of persons? Will it not inevitably load him with the suspicion of partiality, whether he deserves it or not? Is it happily calculated altogether to fix on him the love, trust, and affectionate admiration of the general community with which you agree he ought to be clothed, as with a robe, or he fills his great office in vain? Who does not shrink from such temptation to be partial? Who does not shrink from the suspicion of being thought so? What studious and learned man, of a true self-respect, fitted the

most preëminently for the magistracy by these very qualities and tastes, would subject himself to an ordeal so coarse, and so inappropriate, for the chance of getting to a position where no human purity or ability could assure him a trial by his merits?

"But you will not make judges elective. What is to be feared is, that instead of attempting a larger mischief, in which you must fail, you will attempt a smaller, in which you may succeed. You will not change the system which has worked so well, very much, you say, but you will change it some; and therefore you will continue to appoint by the governor. But instead of appointing during good behavior, subject to impeachment, and subject to removal by the legislature, you will appoint him for a term of years — five years, seven years, ten years.

"Well, Sir, without repeating that no reason for any change is shown, and that no manner of evidence has been produced to prove that this project of executive appointment for limited terms, has ever succeeded anywhere — pretty important considerations for thoughtful persons, likely to weigh much with the people — there are two objections to this system, which ought, in my judgment, to put it out of every head. And, in the first place, it will assuredly operate to keep the ablest men from the Bench. You all agree that you would have there the ablest man whom three thousand dollars or twenty-one hundred dollars per annum will command. The problem is, one part of the problem is, how shall we get the best judge for that money?

"And now, if my opinion is worth anything, I desire to express it with all possible confidence, that this change of tenure will infallibly reduce the rate of men whom you will have on the Bench. Not every one, in all respects equal to it, can afford it now. It has been said, and is notorious, that it is offered and rejected. The consideration of its permanence is the decisive one in its favor, whoever accepts it. The salary is inadequate, but if it is certain, certain as good judicial behavior — it ought not to be more so — it may be thought enough. Deprive it of that moral makeweight, and it is nothing. Why should a lawyer, accumulating, or living, by his practice, look at a judgeship of ten years? What does he see and fear? At the end of that time he is to descend from the Bench, a man forty-five or fifty or sixty years of age, without a dollar, or certainly requiring some means of increasing his income. Every old client is lost by this time, and he is to begin life as he began it twenty or thirty years before. Not



quite so, even. Then he was young, energetic, and sanguine. He is older now, and is less disposed to the contentious efforts of the law. More than that, he is less equal to them for another reason than the want of youth. If he has, during the full term of ten years, been good for anything; if he has been 'a judge, altogether a judge, and nothing but a judge,' then his whole intellectual character and habits will have undergone a change, itself incapable of change. He will have grown out of the lawyer into the magistrate. He will have put off the gown of the bar, and have assumed the more graceful and reverend ermine of the Bench. The mental habits, the mental faults of the advocate, the faults ascribed by satire to the advocate, the faults or habits of his character, the zeal, the constant energy bestowed on all causes alike; the tendencies, and the power to aggravate and intensify one side of a thesis, and forget or allow inadequate importance to the other — these, if he has been a good judge, or tried his best to be a good judge for ten years, he has lost, he has conquered, and has acquired in their place that calmer and that fairer capacity to see the thing, fact, or law, just as it is. Thus changed, it will be painful to attempt to recover the advocate again; it will be impracticable, if it is attempted. To regain business, he must find new clients; to find or keep them, he must make himself over again. Accordingly, how rare are the cases where any man above the age of forty, after having served ten years on the Bench, seeking to cultivate judicial habits, and win a true judicial fame, has returned to a full business at the bar. I never heard of one. Such a retired judge may act as a referee. He may engage somewhat in chamber practice, as it is called, though the result of all my observation has been, that unless he *can attend his opinions through court*; can there explain and defend them; *unless he can keep his hand so much in that he feels and knows at all times which way the judicial mind is tending on the open questions of the law* — his chamber practice holds out a pretty slender promise for the decline of a life unprovided for. He who would be a lawyer, must unite the study of the books and the daily practice of the courts, or his very learning will lead him astray.

"I have been amused at the excellent reasons given to show why an able man, at the head of the bar, in full practice, forty years of age, a growing family and no property, should just as soon accept a judgeship for ten years as during good behavior. Some say a judge never lives but ten years on the Bench — or thirteen at the

outside — anyhow. They show statistics for it. They propose, therefore, to go to such a man and tender him the situation. He will inconsiderately answer that he should like the Bench; thinks he could do something for the law; should rejoice to give his life to it; but that the prospect of coming off at fifty, and going back to begin battling it again with 'these younger strengths,' is too dreary, and he must decline. 'Bless you,' say the gentlemen, 'don't trouble yourself about that, if that is all. You can't live but thirteen years, the best way you can fix it. Here is the secretary's report — with a printed list as long as a Harvard College catalogue — putting that out of all question!' Do you think this will persuade him? Does he expect to die in ten years? Who does so? Did the names on these statistics?

"Others guess that the ten-years judge will be reappointed, if he behaves well. But unless he is a very weak man indeed, will he rely on that? Who will assure it to him? Does he not know enough of life to know how easy it will be, after he has served the State, the law, his conscience and his God for the stipulated term; after the performance of his duty has made this ambitious young lawyer or that powerful client his enemy for life; after having thus stood in the way of a greedy competitor too long — how easy it will be to bring influences to bear on a new governor, just come in at the head of a flushed and eager party, to allow the old judge's commission to expire, and appoint the right sort of a man in his place? Does he not know how easy it will be to say, 'Yes, he is a good judge enough, but no better than a dozen others who have just put you in power; there are advantages in seating a man on the Bench who is fresh from the bar; there is no injustice to the incumbent — did n't he know that he ran this risk?' Too well he knows it, Sir, to be tickled by the chance of 'finding the doom of man reversed for him,' and he will reject the offer.

"Herein is great and certain evil. How you can disregard it — how you can fail to appreciate what an obvious piece of good economy it is; economy worthy of statesmen — binding on your conscience; to so construct your system as to gain for the bench the best man whom three thousand dollars per annum can be made to command, passes all comprehension. Surely you will not reply that there 'will be enough others to take it.' If the tendency of what you propose is appreciably to lessen the chances of obtaining the best, is it any excuse to say that fools will rush in where others will not tread?



"But there is still another difficulty. He who does accept it, and performs as an hireling his day, will not only be an ordinary man comparatively, at the start, but he holds a place, and is subjected to influences, under which it will be impossible to maintain impartiality, and the reputation of impartiality; impossible to earn and keep that trust, and confidence, and affectionate and respectful regard, which the judge must have, or he is but half a judge.

"I have sometimes thought that the tenure of good behavior has one effect a little like that which is produced by making the marriage tie indissoluble. If the 'contract which renovates the world' were at the pleasure of both parties, they would sometimes, often, quarrel and bring about a dissolution in a month. But they know they have embarked for life—for good and ill—for better and worse; and they bear with one another; they excuse one another—they help one another—they make each other to be that which their eyes and their hearts desire. A little so in the relation of the judge to the bar and the community. You want to invest him with honor, love, and confidence. If every time when he rules on a piece of evidence, or charges the jury, a young lawyer can say, half aloud in the bar, or his disappointed client can go to the next tavern to say, 'My good fellow, we will have you down here in a year or two—you shall answer for this—make the most of your time'—and so forth; is it favorable to the culture of such sentiments? Does it tend to beget that state of mind towards him in the community which prompts 'the ear to bless him, and the eye to give witness to him?' Does it tend in him to 'ripen that dignity of disposition which grows with the growth of an illustrious reputation; and becomes a sort of pledge to the public for security?' Show to the bar, and to the people, a judge by whom justice is to be dispensed for a lifetime, and all become mutually coöperative, respectful, and attached.

"And still further. This ten-years judge of yours is placed in a situation where he is in extreme danger of feeling, and of being suspected of feeling so anxious a desire to secure his reappointment, as to detract, justly or unjustly, somewhat from that confidence in him without which there is no judge. It is easy for the gentleman from Abington [Mr. Keyes] to feel and express, with his habitual energy, indignation at the craven spirit which could stoop to do anything to prolong his term of office. It is easy, but is it to the purpose? All systems of judicial appointment and tenure suppose

the judge to be a mortal man, after all; and all of them that are wise, and well tried, aim to fortify, guard, and help that which his Maker has left fallible and infirm. To inveigh against the lot of humanity is idle. Our business is to make the best of it; to assist its weakness: make the most of its virtue; by no means, by no means to lead it into any manner of temptation. He censures God, I have heard, who quarrels with the imperfections of man. Do you not, however, tempt the judge, as his last years are coming, to cast about for reappointment; to favor a little more this important party or this important counsel, by whom the patronage of the future is to be dispensed? He will desire to keep his place, will he not? You have disqualified him for the more active practice of his profession. He needs its remuneration. Those whom he loves depend on it. The man who can give it or withhold it, is before him for what he calls justice; on the other side is a stranger without a name. Have you placed him in no peril? Have you so framed your system, as to do all that human wisdom can do — to 'secure a trial as impartial as the lot of humanity will admit'? If not, are we quite equal to the great work we have taken in hand?

"There are two or three more general observations with which I leave the subject, which the pressure on your time, and my own state of health, unfit me for thoroughly discussing.

"In constructing our judicial system, it seems to me not unwise so to do it, that it shall rather operate, if possible, to induce young lawyers to aspire to the honors of the bench, not by means of party politics, but by devoting themselves to the still and deep studies of this glorious science of the law. A republic, it is said, is one great scramble for office, from the highest to the lowest in the State. The tendencies certainly are to make every place a spoil for the victor, and to present to abilities and ambition *active service in the ranks of party, victory under the banner, and by the warfare of party*, as the quickest and easiest means of winning every one. How full of danger to justice, and to security, and to liberty, are such tendencies, I cannot here and now pause to consider. These very changes of the judicial system, facilitating the chances of getting on the bench by party merits and party titles, will give strength incalculable to such tendencies. How much wiser to leave it as now, were it only to present motives to the better youth of the profession to withdraw from a too active and vehement political life; to conceive, in the solitude of their libraries, the idea of a great judicial fame and usefulness; and by profound study and



the manly practice of the profession alone seek to realize it; to so prepare themselves, in mind, attainments, character, to become judges by being lawyers only, that when the ermine should rest on them, it should find, as was said of Jay—as might be said of more than one on the bench of both Courts, of one trained by our system for the bench of the Supreme National Court—it should find “nothing that was not whiter than itself.”

“I do not know how far it is needful to take notice of an objection by the gentleman from Fall River [Mr. Hooper], and less or more by others, to the existing system, on the ground that it is monarchical, or anti-republican, or somehow inconsistent with our general theories of liberty. He has dwelt a good deal on it; he says we might just as well appoint a governor or a representative for life, or good behavior, as a judge; that it is fatally incompatible with our frame of government, and the great principles on which it reposes. One word to this. It seems to me that such an argument forgets that our political system, while it is purely and intensely republican, within all theories, aims to accomplish a twofold object, to wit: liberty and security. To accomplish this twofold object we have established a twofold set of institutions and instrumentalities; some of them designed to develop and give utterance to one; some of them designed to provide permanently and constantly for the other; some of them designed to bring out the popular will in its utmost intensity of utterance; some of them designed to secure life, and liberty, and character, and happiness, and property, and equal and exact justice, against all will, and against all power. These institutions and instrumentalities in their immediate mechanism and workings are as distinct and diverse, one from the other, as they are in their offices, and in their ends. But each one is the more perfect for the separation; and the aggregate result is our own Massachusetts.

“Thus in the law-making department, and in the whole department of elections to office of those who make and those who execute the law, you give the utmost assistance to the expression of liberty. You give the choice to the people. You make it an annual choice; you give it to the majority; you make, moreover, a free press; you privilege debate; you give freedom to worship God according only to the dictates of the individual conscience. These are the mansions of liberty; here are her arms, and here her chariot. In these institutions we provide for her: we testify our

devotion to her; we show forth how good and how gracious she is — what energies she kindles; what happiness she scatters; what virtues, what talents wait on her — vivifying every atom, living in every nerve, beating in every pulsation.

“ But to the end that one man, that the majority, may not deprive any of life, liberty, property, the opportunity of seeking happiness, there are institutions of security. There is a Constitution to control the government. There is a separation of departments of government. There is a judiciary to interpret and administer the laws, ‘ that every man may find his *security* therein.’ And in constituting these provisions for security, you may have regard mainly to the specific and separate objects which they have in view. You may very fitly appoint a few judges only. You may very fitly so appoint them as to secure learning, impartiality, the love and confidence of the State; because thus best they will accomplish the sole ends for which they are created at all. If to those ends, too, it has been found, in the long run, as human nature is, that it is better to give them a tenure of good behavior, you may do so without departing in the least degree from either of the two great objects of our political system. You promote one of them directly by doing so. You do it without outrage on the other. Your security is greater; your liberty is not less. You assign to liberty her place, her stage, her emotions, her ceremonies; you assign to law and justice theirs. The stage, the emotions, the visible presence of liberty, are in the mass meeting; the procession by torchlight; at the polls; in the halls of legislation; in the voices of the press; in the freedom of political speech; in the energy, intelligence and hope, which pervade the mass; in the silent, unreturning tide of progression. But there is another apartment, smaller, humbler, more quiet, down in the basement story of our capitol — appropriated to justice, to security, to reason, to restraint; where there is no respect of persons; where there is no high nor low, no strong nor weak; where will is nothing, and power is nothing, and numbers are nothing — and all are equal, and all secure, before the law. Is it a sound objection to your system, that in that apartment you do not find the symbols, the cap, the flag of freedom? Is it any objection to a court-room that you cannot hold a mass meeting in it while a trial is proceeding? Is liberty abridged, because the procession returning by torchlight, from celebrating anticipated or actual party victory, cannot pull down a half dozen houses of the opposition with im-



punity; and because its leaders awake from the intoxications of her *saturnalia* to find themselves in jail for a riot? *Is it any objection that every object of the political system is not equally provided for in every part of it?* No, Sir. 'Every thing in its place, and a place for every thing!' *If the result is an aggregate of social and political perfection, absolute security combined with as much liberty as you can live in, that is the state for you!* Thank God for that; let the flag wave over it; die for it!

"One word only, further, and I leave this subject. It has been maintained, with great force of argument, by my friend for Manchester, that there is no call by the people for any change of the judicial system. Certainly there is no proof of such a call. The documentary history of the Convention utterly disproves it. But that topic is exhausted. I wished to add only, that my own observation, as far as it has gone, disproves it too. I have lost a good many causes, first and last; and I hope to try, and expect to lose, a good many more; but I never heard a client in my life, however dissatisfied with the verdict, or the charge, say a word about changing the tenure of the judicial office. I greatly doubt, if I have heard as many as three express themselves dissatisfied with the judge; though times without number they have regretted that he found himself compelled to go against them. My own tenure I have often thought in danger — but I am yet to see the first client who expressed a thought of meddling with that of the court. What is true of those clients, is true of the whole people of Massachusetts. Sir, that people have two traits of character—just as our political system in which that character is shown forth has two great ends. They love liberty; that is one trait. They love it, and they possess it to their heart's content. Free as storms to-day do they not know it, and feel it—every one of them, from the sea to the Green Mountains? But there is another side to their character; and that is the old Anglo-Saxon instinct of property; the rational and the creditable desire to be secure in life, in reputation, in the earnings of daily labor, in the little all which makes up the treasures and the dear charities of the humblest home; the desire to feel certain when they come to die that the last will shall be kept, the smallest legacy of affection shall reach its object, although the giver is in his grave; this desire and the sound sense to know that a learned, impartial, and honored judiciary is the only means of having it indulged. They have nothing timorous in them, as touching the largest liberty.

They rather like the exhilaration of crowding sail on the noble old ship, and giving her to scud away before a fourteen-knot breeze; but they know, too, that if the storm comes on to blow; and the masts go overboard; and the gun-deck is rolled under water; and the lee shore, edged with foam, thunders under her stern, that the sheet anchor and best bower then are every thing! Give them good ground-tackle, and they will carry her round the world, and back again, till there shall be no more sea."



## TWO THEORIES OF CONSIDERATION.

## II. BILATERAL CONTRACTS.

SINCE a promise is an act, one who defines consideration as any act of forbearance given in exchange for a promise, will necessarily find a consideration in every case of mutual promises. This, it is submitted, is the correct view upon principal.<sup>1</sup> In point of authority no difficulty is presented except in two classes of cases. First, those in which one of the parties promises to perform a pre-existing contractual duty to a third person. Secondly, those in which one of the parties promises to perform a pre-existing contractual duty to the counter-promisor. It will be convenient to deal with these two classes of cases separately.

I. Promises of performance of a pre-existing contractual duty to a third person.

There is believed to be no reported case in which a promise to perform a contract with A has been adjudged insufficient to support a promise by B. In a few American cases in which the plaintiff failed to recover upon a unilateral promise given in consideration of the performance of the plaintiff's contract with another, there are *dicta* placing the agreement to do and the doing of what one is already bound to do upon the same footing.<sup>2</sup> On the other hand in *Shadwell v. Shadwell*<sup>3</sup> and *Scotson v. Pegg*,<sup>4</sup> in which the de-

<sup>1</sup> Public policy may forbid the enforcement of a bilateral contract as it frequently precludes recovery upon unilateral contracts. A promise, for instance, in consideration of a counter-promise to commit a crime, or a tort, will not give a cause of action. The same is true of a promise of abstention from the commission of a crime or tort or grossly immoral conduct or from the breach of an official or statutory duty. It is clearly against the interest of the community to allow an action in these cases, notwithstanding the formal contract that is completed by the promise and the consideration.

<sup>2</sup> *Reynolds v. Nugent*, 25 Ind. 328, 329, 330; *Harrison v. Cassady*, 107 Ind. 158, 168; *Schuler v. Myton*, 48 Kan. 282, 288; *Vanderbilt v. Schreyer*, 91 N. Y. 392, 401; *Seybolt v. New York Co.*, 95 N. Y. 562, 575. See also *Jones v. Waite*, 5 Bing. N. C. 341, 351, 356, 358-359. To these cases may be added *Ecker v. McAllister*, 45 Md. 290, 54 Md. 362. In this case the court in deciding, in opposition to the majority of the modern authorities, that forbearance to prosecute a *bona fide* but groundless claim against A was not a consideration for a promise by B, said extrajudicially that a promise of such forbearance would not support a counter-promise by B.

<sup>3</sup> 9 C. B. N. s. 159.

<sup>4</sup> 6 H. & N. 295.

fendant was charged upon a unilateral contract, the plaintiff would without doubt, have been equally successful had the contract been bilateral. The plaintiff did succeed upon similar bilateral contracts in *Abbot v. Doane*<sup>1</sup> and *Green v. Kelley*.<sup>2</sup>

The only judicial intimation of a distinction, in point of consideration, between the performance and a promise to perform a contractual duty to a third person is this statement by James, J., in *Merrick v. Giddings*.<sup>3</sup> "A promise made in consideration of the doing of an act which the promisee is already under obligation to the third party to do . . . is not binding, because it is not supported by a valuable consideration. On the other hand, if a promise be made in consideration of a *promise* to do that act . . . then the promise is binding, because not made in consideration of the performance of an existing obligation to another person, but upon a new consideration moving between the promisor and promisee." This *dictum* was confessedly inspired by the following passage from Pollock on Contracts: <sup>4</sup> "But there seems to be no solid reason why the promise should not be good in itself, and therefore a good consideration. It creates a new and distinct right, which must always be of some value in law, and may be of appreciable value in fact. There are many ways in which B may be very much interested in A's performing his contract with C, but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. It may be well worth his while to give something for being enabled to insist in his own right on the thing being done." The court seems not to have been aware that the same distinction had been taken by Professor Langdell in his summary of the law of Contracts: <sup>5</sup> "It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding, though the promise on one side be merely to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not therefore be a sufficient consideration. The reason of this distinction is that a person does not, in legal contemplation, incur any detriment by doing a

<sup>1</sup> 163 Mass. 433.

<sup>2</sup> 64 Vt. 309.

<sup>3</sup> 1 Mack. 394, 410, 411.

<sup>4</sup> (1st ed.) 158. It is to be regretted that the learned author came afterwards to doubt the soundness of this statement. Contracts (4th ed.), 179; 3 Eng. Encycl. of Law, 341.

<sup>5</sup> Sect. 84.



thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.*, one to each of two persons) though each be to do the same thing."

Sir William Anson, on the other hand, rejects this distinction as involving the vice of reasoning in a circle: "If we say that the consideration is the detriment to the promisee exposing himself to two suits instead of one for the breach of contract, we beg the question, for we assume that an action would lie on such a promise."<sup>1</sup> The learned author seems not to have appreciated the far-reaching effect of this criticism. For, as Professor Williston has pointed out, it applies with equal force to all cases of mutual promises.<sup>2</sup> Professor Williston, however, concurs with Anson's criticism of the theory advanced by Pollock and Professor Langdell, but, in order to prevent its application to bilateral contracts generally, proposes to "revise slightly the test of consideration in a bilateral contract, seeking the detriment necessary to support a counter-promise in the thing promised, and not in the thing itself." Against this view that a promise will be a consideration when, and only when, that which is promised would be so regarded, two objections may be urged. First, the test proposed is artificial; secondly, to assume the validity of the promises covered by this test is precisely the same begging of the question that Professor Langdell's critics have found so objectionable in the case of the promise to A to perform one's contract with B. One who follows these critics must therefore put all valid bilateral contracts into the category of inexplicable anomalies.

But is there, in truth, any foundation for the criticism of Professor Langdell's doctrine that mutual promises between A and B are binding, although A promises to do what he was already bound to do by a contract with C? Is not the alleged question-begging in this case, and indeed in all cases of mutual promises, purely imaginary? To answer these questions we must ascertain just what is the consideration in the case of bilateral contracts. Everyone will concede that the consideration for every promise must be some act or forbearance given in exchange for the promise. The act of each promisee in the case of mutual promises is obviously

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<sup>1</sup> Anson, *Contracts* (8th ed., p. 92; 1st ed., p. 80).

<sup>2</sup> 8 *Harv. Law. Rev.* 35.

the giving of his own promise *animo contrahendi* in exchange for the similar promise of the other. And this is all that either party gives to the other. This, then, must be the consideration for each promise; and it is ample on either of the two theories of consideration under discussion. For the giving of the promise is not only an act, but an act that neither was under any obligation to give. This simple analysis of the transaction of mutual promises is free from arbitrary assumptions and from all reasoning in a circle. The supposed difficulty in this class of cases springs from the assumption that the consideration in a bilateral contract is the legal obligation, as distinguished from the promise, of each party. But this is to overlook the difference between the act of a party and the legal result of the act. The party does the act, the law imposes the obligation. Suppose, for example, that X promises to pay A a certain amount of money in consideration of A's signing, sealing, and delivering, *animo contrahendi*, a writing containing a promise by A to convey a certain tract of land to X, and that A does sign, seal, and deliver the written promise accordingly. X is unquestionably bound by this acceptance of his offer. A, however, has done nothing beyond the performance of certain formal acts. These acts alone must form the consideration of X's promise. Indeed X by the express terms of his offer stipulated for precisely that consideration. He was willing to do so, of course, because the performance of those acts would bring A within the rule of law which imposes an obligation upon any one who executes a sealed promise. Precisely the same reasoning applies in the case of mutual promises. Each party is content to have the promise of the other given *animo contrahendi*, because each is thereby brought within the rule of law which imposes an obligation upon any one who has received what he bargained for in return for his promise.

The form of declaration upon a bilateral contract is significant. The count never alleges any obligation on the part of the plaintiff, but states simply, in accordance with the facts, that, in consideration that the plaintiff promised to do a certain thing, the defendant promised to do a certain other thing. The courts too from the earliest times of mutual promises have designated the promise as the consideration of the counter-promise.<sup>1</sup>

<sup>1</sup> *Wichals v. Johns* (1599), Cro. El. 703. "A promise against a promise is a good consideration;" *Bettisworth v. Campion* (1608), Yelv. 134: "The consideration on each part was the mutual promise of the one to the other." See also *Strangborough v. Warner* (1588), 4 Leon. 3; *Gower v. Capper* (1597), Cro. El. 543.



The fact that it is the promise and not the legal obligation of each party that forms the consideration for the promise of the other, explains certain classes of cases in which one party is under a legal liability from the outset, although no action will ever be maintainable against the other. If, for example, A is induced to enter into a bilateral contract with B by the fraud of the latter, the contract cannot be enforced against A, but A may enforce it against B. This is shown by several cases of engagement to marry between a man already married and a woman who believed him to be single.<sup>1</sup> The consideration is ample on both sides, but public policy forbids an action in favor of the deceiver, but cannot be urged against a recovery by the innocent party.<sup>2</sup> The same result would follow in the case of a bilateral contract procured by duress practised by one of the parties upon the other. Again, if only one of the parties to a bilateral contract within the Statute of Frauds has signed a memorandum, he may be charged upon the contract, although he cannot charge the other party.<sup>3</sup> He must suffer, not because either promise lacks consideration, but for his fault in not obtaining a memorandum of the contract signed by his adversary. Similarly an adult is bound by his promise, although he has no remedy on the counter-promise of an infant, it being thought expedient to give the latter this protection against his own improvidence.<sup>4</sup> Whether a bilateral contract is enforceable by either of the parties if one was insane when the promises were given is not definitely settled.<sup>5</sup> It would seem reasonable to charge the sane promisor if he were aware of his co-promisor's insanity, but not otherwise. The same distinction should obtain, in the absence of legislation enabling a married woman to contract, in the case of mutual promises between a married woman and another. But there is no recognition of this distinction in the decisions; nor, on the other hand, has any deci-

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<sup>1</sup> *Wild v. Harris*, 7 C. B. 999; *Millward v. Littlewood*, 5 Ex. 775; *Kelley v. Riley*, 106 Mass. 339; *Blattmacher v. Saal*, 29 Barb. 22; *Cammerer v. Muller*, 14 N. Y. Sup. 511, affirmed without opinion in 133 N. Y. 623; *Stevenson v. Pettis*, 12 Phila. 468; *Coover v. Davenport*, 1 Heisk. 363; *Pollock v. Sullivan*, 53 Vt. 507.

<sup>2</sup> If the woman knew that her fiancé was already married, neither can maintain an action against the other. *Noce v. Brown*, 39 N. J. 133; *Haviland v. Halsted*, 34 N. Y. 643.

<sup>3</sup> *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Justice v. Lang*, 42 N. Y. 493, and cases cited in *Browne, Statute of Frauds* (5th ed.), 495, n. 1.

<sup>4</sup> *Holt v. Ward*, 2 Stra. 937; *Bruce v. Warwick*, 6 Taunt. 118; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; *Atwell v. Jenkins*, 163 Mass. 362 (*semble*); *Moynahan v. Agricultural Co.*, 53 Mich. 238; *Hunt v. Peake*, 5 Cow. 475.

<sup>5</sup> See *Atwell v. Jenkins*, 163 Mass. 362, 364.

sion been found at variance with it.<sup>1</sup> A married woman's freedom to contract is now so generally sanctioned by statute that the validity of the distinction here suggested is not likely to be brought to the test of judicial decision. But if, before the modern legislation, a man had said to a married woman: "I know your promise is not legally binding; nevertheless if you will promise, with the intention of keeping your word, to use your influence with your husband in favor of sending your son to college, I will promise to pay his tuition fees;" and the woman promised accordingly, is there any reason why the man should not be bound by his promise? Mutual promises between a corporation acting *ultra vires* and another give no right of action to either party. Public policy demands this result. As Lord Campbell, C. J., said: "It would indeed be strange if a corporation entering into a commercial contract might enforce it at pleasure, but might break it with impunity whenever fraudulently induced to do so."<sup>2</sup>

That the consideration in bilateral contracts is the promise and not the legal obligation of each party is most convincingly proved by the cases in which, from the very nature of the transaction, and as both parties clearly understand, mutual obligations are impossible. In a wager, for example, upon an issue already irrevocably determined, but the determination of which is unknown to the parties, one of them is liable to an action at the very moment of the wager, while the other is not then nor ever will be bound to do anything.<sup>3</sup> Suppose, again, a difference to arise between the parties to a sale as to the number of acres in a tract of land sold as containing five hundred acres, and the seller to promise to pay \$20 for every acre less than five hundred in return for the buyer's promise to pay \$20 for every acre in excess of five hundred. Here, too, one of the parties is free and the other bound the moment the promises are exchanged. Judgment was given for the plaintiff in

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<sup>1</sup> In several cases bills by married women for specific performance have been dismissed in accordance with the familiar principle that specific performance will not be decreed unless the remedy is mutual. *Warren v. Costello*, 109 Mo. 338; *Lanier v. Ross*, 1 Dev. & B. Eq. 39; *Tarr v. Scott*, 4 Brewst. (Pa.), 49; *Williams v. Graves*, 7 Tex. Civ. Ap. 356; *Shenandoah Co. v. Dunlop*, 86 Va. 346. In *Shaver v. Bear River Co.*, 10 Cal. 396, the counter-promise was *ultra vires*.

<sup>2</sup> *Copper Miners v. Fox*, 16 Q. B. 229, 237.

<sup>3</sup> "There was a wager laid between A and B concerning the quantity of yards of velvet in a cloak, and each of them agreed that if there were ten yards of velvet in the cloak that then they should be delivered to B, and if not to A. This is good and may be pursued accordingly." *Shep. Act.* (2d ed.), p. 178.



such a case.<sup>1</sup> If the consideration of the enforceable promise must be found, if at all, in a legal obligation of the party giving the counter-promise, it would be impossible to support the decision in this and similar cases. But the decisions are clearly right if the mere promise of the winner is the consideration for the promise of the loser. That this was the intention of the parties can hardly be questioned. Each one gives his promise in exchange for a counter-promise which he knows may prove worthless to him. But because of his ignorance of the true state of the case each is content to take the promise of the other for better or worse, and the loser is justly bound by his bargain because he has received in exchange for his promise the very thing that he asked for.

The question whether a promise to perform a pre-existing contractual duty to a third person may be a consideration for a counter-promise has been discussed thus far as a matter of principle. As already stated, although there are some adverse *dicta*, there is no decision adjudging such a consideration to be invalid. But these *dicta* are more than offset by an important class of decisions, which cannot be sustained except upon the theory that such a consideration is valid. These decisions illustrate one form of the familiar doctrine of novation. C, for instance, conveys property to A, who promises therefore to pay C's debt to B. Subsequently A and B enter into a bilateral contract, A promising to B to pay C's debt to him, and B promising A never to sue C upon the debt. B's promise operates as an equitable release of C, and A becomes bound to B in C's place. And yet A has promised B only what he was already bound to do by his prior contract with C. No one can doubt that the validity of this form of novation is firmly established in our law.<sup>2</sup> But more than this, any theory of consideration which would nullify this rational business arrangement stands *ipso facto* condemned, unless inexorable logic compels its recognition. But, if the reasoning in the preceding pages is sound, the logic is all in favor of the novation.

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<sup>1</sup> Seward v. Mitchell, 1 Coldw. 87; Williston, Cases, on Contracts, s. c. 554. See to the same effect, March v. Pigott, 5 Burr. 2802; Barnum v. Barnum, 8 Conn. 469; Howe v. O'Malley, 1 Murph. 287; Supreme Assembly v. Campbell, 17 R. I. 402. Professor Langdell considers these cases erroneous in principle, and regards them as illustrations of the rule "*Communis error facit jus*." Summary, sect. 69.

<sup>2</sup> Bird v. Gannon, 3 Bing. N. C. 883; *Re Times Co.*, 5 Ch. 381; *Re Medical Co.*, 6 Ch. 362; Rolfe v. Flower, L. R. 1 P. C. 27; McLarin v. Hutchinson, 22 Cal. 187; Bowen v. Kurtz, 37 Iowa, 239; Langdon v. Hughes, 107 Mass. 272; Scott v. Hallock, 16 Wash. 439.

No other decisions upon the point under discussion have been found. But imaginary cases may be put. C, wishing to assist his friend B, makes a bilateral contract with A, A promising to discount all bills offered by B between January and July, 1898, up to the limit of \$10,000, and C promising to indemnify A. Subsequently B obtains a similar promise from A to himself in return for a promise on his own part. A afterwards declines to discount bills when offered, claiming that the mutual promises between himself and B are not binding because his own promise was to do what he was already bound to do by his contract with C.<sup>1</sup>

Again, a father wishing his son to live in a house near his own, promises the son to furnish the house in return for the son's promise to buy it of X, the owner. Subsequently the son and X enter into a mutual written agreement for the purchase of the house. The father then learns that a more desirable house may be obtained at the same price, and agrees to furnish that instead of the other. The son accordingly notifies X that he will not take X's house, and when reminded of his contract answers, "Oh, our agreement was no contract. I had already promised to my father to buy the house, so my promise to you to buy it was no consideration for your promise, and both promises are worthless." Would any court exonerate the son?

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<sup>1</sup> By varying slightly the facts of this supposed case and applying the theory of those who dissent from *Shadwell v. Shadwell* and *Scotson v. Pegg*, namely, that the performance of an existing contract with a third person cannot be a consideration for a promise, we obtain a somewhat startling result. Suppose C, instead of asking for A's promise, merely to offer to indemnify A as to all bills that he may discount for B in a given period up to a given limit. Then, as before, A and B make their bilateral arrangement to discount and reimburse. A thereupon discounts bills when offered, but B becomes insolvent. A then seeks to charge C upon his promise to indemnify. C, however, disclaims liability, because A in discounting the bills was simply performing his contract with B. Suppose still another case. C being interested in the welfare of two young men, A and B, promises each of them \$500 in consideration of their abstaining from the use of intoxicating liquor during the year 1897. To strengthen their resolution to earn the reward, A and B enter into a bilateral contract not to use intoxicating liquor during 1897. They keep this contract, but on applying to C for the promised reward are told that he has changed his mind and that they have no legal claim against him, since they have simply performed their pre-existing contractual duty to each other. Furthermore, those who disapprove of *Shadwell v. Shadwell* must, to be consistent, dissent from *Gurin v. Cromartie*, 11 Ired. 174 (see also *Greenling v. Bawdit*, Sty. 404, and *Culliar v. Jermin*, Sty. (463), in which case C was charged upon a promise in consideration of marriage by a promisee who had no fiancée at the time of C's offer to him. One may well hesitate to acquiesce in a doctrine of consideration that would exonerate C in these three cases. Such a result would be grotesque were it not also unjust.



## II. Promises of Performance of a Pre-existing Contractual Duty to Counter-promisor.

If the parties to a contract see fit for any reason satisfactory to themselves to make a bilateral agreement whereby one of the parties promises to perform his previous contract, it is difficult to see any objection to this genuine bargain on the score of consideration. The new promise is an act, and rendered by one who was entirely free to withhold it. The authorities were formerly in harmony with this logical conclusion.

In 1602, in *Goring v. Goring*,<sup>1</sup> which was a case of mutual promises by the creditor's executor to accept and by the debtor to pay 150 pounds in annual instalments in satisfaction of 205 pounds, the debtor was charged upon the new promise, the court saying: "The consideration alleged is sufficient for another reason; . . . for the plaintiff agreeing to take 150 pounds for 205 pounds is a promise on his part, and so one promise against another." Ten years later another creditor succeeded against his debtor upon the new bilateral agreement, *Flemming, C. J.*, remarking: "This is a very plain and clear case: here the promise is mutual; the plaintiff promised to stay and surcease his suit, and the defendant promised to pay 100 pounds."<sup>2</sup>

The first case in which a new bilateral agreement between a creditor and debtor was judged invalid was *Lynn v. Bruce*.<sup>3</sup> There were mutual promises, as in *Goring v. Goring*,<sup>1</sup> by the creditor to accept and by the debtor to pay 73 pounds in satisfaction of a debt of 105 pounds. The debtor paying only 70 pounds, the creditor brought an action for the other 3 pounds. The plaintiff was unsuccessful; not, however, because the debtor's promise to pay a part of his debt was not a consideration, but strangely enough, because in the opinion of the court the plaintiff's promise was not a consideration. *Goring v. Goring*<sup>1</sup> was not cited, and the court considered themselves bound by the numerous cases in which an accord unexecuted had been held to be no bar to an action upon the original debt. "It was argued," say the court, "according to the cases in *Rol. Abr.*, that an accord executory in

<sup>1</sup> *Yelv. II.*

<sup>2</sup> *Pooley v. Gilberd*, 2 *Bulst.* 41. See to the same effect, *Woolaston v. Webb* (1611), *Hob.* 18; *Flight v. Gresh* (1625), *Hutt.* 77, 78; *Cowlin v. Cook* (1626), *Noy* 83, *Latch* 151, *Poph.* 183. See further, *Thomas v. Way* (Massachusetts, 1893). 52 *N. E. R.* 525., *per. HOLMES, J.*

<sup>3</sup> 2 *H. Bl.* 317.

any part is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument to say that no remedy lies for it for the plaintiff, because it is no bar."

Truly a singular perversion.<sup>1</sup> The explanation just given of *Lynn v. Bruce* is confirmed by the equally remarkable decision in *Reeves v. Hearne*.<sup>2</sup> A creditor agreed to accept and the debtor agreed to give a suit of clothes in satisfaction of the debt. It seems impossible to detect any flaw in this bilateral contract, and yet the creditor was not permitted to recover upon a breach of the promise to deliver the clothes. The court simply followed *Lynn v. Bruce*. Because the creditor could, notwithstanding the new agreement, sue upon his old claim, he should not be permitted to have an action on the new promise. *Reeves v. Hearne* and the reasoning in *Lynn v. Bruce*, if not the case itself, are effectually discredited by later decisions.<sup>3</sup>

Professor Langdell supports *Lynn v. Bruce* on the ground that a debtor's promise to his creditor to pay his debts is not a consideration.<sup>4</sup> But he cites no other authority for this view. The same view is expressed by Leake<sup>5</sup> and Pollock,<sup>6</sup> but without reference

<sup>1</sup> The value of this reasoning will be better appreciated by comparing an accord with an award. Originally, if parties submitted a controversy to arbitration, an award that one party pay a definite amount of money to the other created a debt recoverable by action and also barred the original claim. An accord, — that is, mutual promises, — on the other hand, was neither a cause of action nor a bar to an action before the days of Assumpsit. Fitz. Ab. f. 15, pl. 5; Y. B. 5 Ed. IV. 7-13; Y. B. 16 Ed. IV. 8-5; Y. B. 17 Ed. IV. 8-6; Y. B. 6 Hen. VII. 11-8; *Andrews v. Boughey*, Dy. 75, a, 75, b; *Onely v. Kent*, Dy. 355, b, 356, a. Even an award to do something other than the payment of money had no more legal effect than an accord; for debt was, in early times, the only remedy upon an award. Y. B. 16 Ed. IV. 8-5; 2 Harv. Law Rev. 62. But after Assumpsit came in and implied promises in fact were recognized, any award barred the original claim, since the successful party could sue upon the other's breach of his promise to abide by the award. 2 Harv. Law Rev. 62. The attempt to make an accord also a bar to the original claim by reason of the new remedy of Assumpsit upon the promise failed, as it ought to fail. *Allen v. Harris*, 1 Ld. Ray. 122; *James v. David*, 5 T. R. 141; *Bayley v. Homan*, 3 Bing. N. C. 915; *Gabriel v. Dresser*, 15 C. B. 622. In the case of the award it was not the promises but the subsequent award that constituted the bar. So in the accord it is the subsequent performance that corresponds to the award. If, however, the parties explicitly agree that the new promise, as distinguished from its performance, shall of itself be a satisfaction of the original claim, it will so operate. *Hale v. Flockton*, 14 Q. B. 380, 16 Q. B. 1039 (*semble*); *Johnassohn v. Ransome*, 3 C. B. N. S. 779 (*semble*); *Kromer v. Hill*, 75 N. Y. 574.

<sup>2</sup> 1 M. & W. 323.

<sup>3</sup> *Crowther v. Farrer*, 15 Q. B. 677; *Nash v. Armstrong*, 10 C. B. N. S. 259.

<sup>4</sup> Summary, sect. 89.

<sup>5</sup> Cont. (2d ed.) 619.

<sup>6</sup> Cont. (6th ed.) 176.



to *Lynn v. Bruce*, and is supported by *obiter dicta* of the judges in the few cases that they cite.<sup>1</sup> Professor Williston<sup>2</sup> and Professor Harriman<sup>3</sup> also entertain a similar opinion. One who dissents from such an array of expert opinion cannot fail to recognize the vehemence of the presumption against his own view. But in the present instance it may be fairly urged in point of authority that these writers seem not to have considered the early decisions adverse to their doctrine, that there is not a vestige of authority in its support prior to 1828, and that there is no English decision in its favor since that date.<sup>4</sup>

The reason for this modern doctrine is thus expressed by Pollock: "It is obvious that an express promise by A to B to do something which B can already call on him to do can in contemplation of law produce no fresh advantage to B or detriment to A."<sup>5</sup> To this it may be answered that the law does not pretend to measure the adequacy of a consideration, if there is any consideration. Certainly the making of the new promise by A is an act, and one which he was under no obligation to give. If B thought it sufficiently for his interest to give a counter promise in exchange for A's promise, and the mutual agreement is open to no objection on grounds of policy, why should not the court give

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<sup>1</sup> *Bayley v. Homan*, 3 Bing. N. C. 915, 921; *Jackson v. Cobbin*, 8 M. & W. 790; *Mallalieu v. Hodgson*, 16 Q. B. 689; *Frazer v. Hatton*, 2 C. B. N. S. 512, 524. To these may be added *Philpot v. Briant*, 4 Bing. 717, 721; *Lyth v. Ault*, 7 Ex. 669, 674.

<sup>2</sup> 8 Harv. Law Rev. 27.

<sup>3</sup> Cont. 65.

<sup>4</sup> The doctrine has, however, prevailed in a few of our States. *Ford v. Garner*, 15 Ind. 298; *Eblin v. Miller*, 78 Ky. 371. See also the following note.

<sup>5</sup> Cont. (6th ed.) 176. The American cases in the preceding note proceed upon this same principle. The principle was singularly misapplied by several courts to mutual promises by a creditor to forbear to sue until a fixed day upon a claim already due, and by the debtor to pay at that day legal interest in addition to the principal. *Abel v. Alexander*, 45 Ind. 523; *Hume v. Mazelin*, 84 Ind. 574; *Holmes v. Boyd*, 90 Ind. 332; *Wilson v. Power*, 130 Mass. 127 (*semble*); *Hale v. Forbes*, 3 Mont. 395; *Grover v. Hoppock*, 2 Dutch. 191; *Kellogg v. Olmsted*, 25 N. Y. 189. *Parmelee v. Thompson*, 45 N. Y. 58; *Olmstead v. Latimer* (N. Y. 1899), 33 N. E. R. 5; *Sticker v. Giles*, 9 Wash. 147 (*semble*). The right to an assured income for a definite period is surely a fresh advantage to the creditor, and the duty to pay it is a fresh detriment to the debtor. Accordingly, such a bilateral agreement is generally upheld in this country. *Stallings v. Johnson*, 27 Ga. 564; *Crossman v. Wohlleben*, 90 Ill. 537, 541; *Royal v. Lindsay*, 15 Kan. 591; *Shepherd v. Thompson*, 2 Bush, 176; *Alley v. Hopkins*, 98 Ky. 668; *Chute v. Parke*, 37 Me. 102; *Simpson v. Evans*, 44 Minn. 419; *Moore v. Redding*, 69 Miss. 841; *Fowler v. Brooks*, 13 N. H. 240; *McComb v. Kitttridge*, 14 Oh. 348; *Fawcett v. Freshwater*, 31 Ohio St. 637; *Benson v. Phipps*, 87 Tex. 578.

effect to this bargain as fully as to any other? Furthermore, if the court is to assume the function of measuring the value of an act given in exchange for a promise, we shall have a new crop of fine-spun distinctions. One of these distinctions is illustrated by *Lyth v. Ault*.<sup>1</sup> One of two joint debtors promised to pay the debt in return for the creditor's promise never to sue his co-debtor. The agreement was held valid, because the separate promise of the one might be of more value than the joint promise of the two.<sup>2</sup> If the sole promise to pay the entire claim is more valuable than the original joint liability the sole promise to pay 99 per cent of the claim might also be more valuable. If this is true of a promise of 99 per cent, why not also of a promise of 90 per cent or 50 per cent or of 1 per cent? Where is it possible to draw the line? Obviously this distinction between a new promise by the two joint-debtors and a new promise by one of them is highly technical. But the distinction leads to one result worse than technical. Wherever the doctrine of *Foakes v. Beer* obtains, payment of the whole or a part of the joint debt by one of the debtors is not a valid consideration for a promise of the creditor.<sup>3</sup> And yet by *Lyth v. Ault* a sole promise of such payment is a valid consideration. The bird in the hand is worth less than the bird in the bush! Truly it is a novel standard of value that the courts would give us in overriding the bargain of the parties.<sup>4</sup>

The technical character of the modern attempt to determine the value of a promise may be shown in another way. It has often been decided that a promise by a debtor to pay his debt at a future day in consideration of actual forbearance by the creditor in the meantime is binding.<sup>5</sup> A similar promise by the debtor in consid-

<sup>1</sup> 7 Ex. 669.

<sup>2</sup> A similar agreement was upheld in *Morris v. Van Vorst*, 1 Zab. 100, 119; *Luddington v. Bell*, 77 N. Y. 138; *Allison v. Abendroth*, 108 N. Y. 138; *Jaffray v. Davis*, 124 N. Y. 164, 173 (*semble*). But see *contra* *Early v. Burt*, 68 Iowa, 716.

<sup>3</sup> *Deering v. Moore*, 86 Me. 181; *Weber v. Couch*, 134 Mass. 26; *Line v. Nelson*, 38 N. J. 358; *Harrison v. Wilcox*, 2 Johns. 448; *Martin v. Frantz*, 127 Pa. 389.

<sup>4</sup> In *Bendix v. Ayers*, 21 N. Y. Ap. Div. 570, the court decided that the part payment of a joint debt by one of the debtors was a valid consideration, because the promise of partial payment of one of the debtors, which was confessedly valid, "is certainly not as advantageous to the creditor as the acceptance of the actual money." The good sense of the argument is indisputable, but the doctrine of *Foakes v. Beer* is still law in New York.

<sup>5</sup> *Smith v. Hitchcock*, 1 Leon 252; *Tenancy v. Brown*, Cro. El. 272; *May v. Alvares*, Cro. El. 387; *Baker v. Jacob*, 1 Bulst. 41; *Pete v. Tongue*, 1 Roll. R. 404; *King v. Weeden*, Sty. 264; *Boone v. Eyre*, 2 W. Bl. 1312; *Hopkins v. Logan*, 5 M. & W. 241.



eration of the creditor's covenant to forbear must be equally valid. Shall a similar promise in consideration of the creditor's simple promise to forbear be invalid?

Again, as appears from *Morton v. Burn*,<sup>1</sup> the assignee of a chose in action may make a valid bilateral contract with the debtor, the assignee promising to forbear for a time to sue the debtor in the name of the creditor (or to-day in his own name) in return for the debtor's promise to him to pay the debt. Shall such mutual promises between the assignee, the *dominus* of the claim, and the debtor be valid, but similar promises between a creditor and the debtor when the debt is not assigned be invalid?

Since a right of action in *Assumpsit* may be more advantageous than an action of *Covenant* either because the specialty may be lost, or the creditor might wish to join his action with other counts in *Assumpsit*, or for some other reason, shall a promise by a specialty debtor to pay his debt be a consideration for a promise by the creditor, and a similar promise by a simple contract creditor be no consideration?

Since a promise in writing is more readily proved than an oral promise, shall the new bilateral written agreement by the creditor to forbear and the debtor to pay be valid if the original debt were oral, but not valid if it were in writing?

Even if this test of value is to be applied, must not every promise of payment made by a simple contract debtor after the debt is due be a consideration? For the new promise is in one respect more valuable than the old liability, since it will survive after the old claim is barred by the Statute of Limitations.<sup>2</sup>

On the other hand, this same test of value is irreconcilable with two classes of decisions which are not likely to be overruled. First, those allowing an action upon a wager on a past event or upon the kindred mutual promises already considered?<sup>3</sup> For at the moment of the bargain one of the promises, as both parties know, must be worthless. Secondly, the cases, already discussed,<sup>4</sup> in which one of the parties to a bilateral contract wrongfully refusing to go on, it is mutually agreed to rescind the contract and to substitute a new one in its place, whereby the dissatisfied party agrees to perform his original undertaking in return for the other's

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<sup>1</sup> 7 A. & E. 19.

<sup>2</sup> *Stallings v. Johnson*, 27 Ga. 564. See also *Hopkins v. Logan*, 5 M. & W. 241.

<sup>3</sup> *Supra*, page 34, note 3, and page 35, note 1.

<sup>4</sup> 12 Harv. Law Rev. 528, n. 2.

promise of larger compensation. In neither of these classes of cases can there be a consideration, except upon the principle that any act by a promisee in exchange for a promise is a consideration.

It is clear that this innovation of the nineteenth century, by which the courts assume to determine the value of an act irrespective of the value set upon it by the parties, is not a success. It breaks up reasonable bargains, and cumbers the law with unreasonable distinctions. It is not yet too late to abandon this modern invention and to return to the simple doctrine of the fathers, who found a consideration in the mere fact of a bargain, in other words, in any act of forbearance given in exchange for a promise. This rule gives the formality needed as a safeguard against thoughtless gratuitous promises, meets the requirements of business men, and frees the law of consideration from subtleties that serve no useful purpose.

*James Barr Ames.*



## SOUTHCOTT v. BENNETT.

QUEEN'S BENCH, PASCH. 43 ELIZ. (1601).<sup>1</sup>[*Same Case*, 4 *Coke*, 83 b.; *Cro. Eliz.* 815.]

If goods are accepted to be kept safely by the bailee, and the goods are stolen, *it seems* that the bailee is liable in detinue to the bailor.

If goods are accepted generally whether the bailee is liable in such a case, *quaere*.

If goods in possession of a bailee are taken or destroyed by a wrongdoer, *it seems* that the bailee is liable in detinue to the bailor, unless he can show that he has exhausted his remedies against the wrongdoer.

If the defendant demurs specially to a replication which is formally defective, *it seems* that he shall have judgment, though the plea be defective in substance; *aliter* if he demurs generally.

SOUTHCOTT brought a writ of detinue against Bennett for certain goods, and declared that he bailed them to the defendant to keep safely, etc. The defendant confessed the bailment, and pleaded in bar that after the bailment one J. S. stole them feloniously out of his possession, etc. The plaintiff replied, and, protesting that said J. S. did not steal said goods, said for plea that he was the defendant's servant retained in his service; and demanded judgment, etc. And thereupon the defendant demurred in law.

*Dodderidge* for the defendant moved that the plaintiff be barred. And he agreed that in detinue for goods bailed to the defendant it is a good plea that they were stolen by thieves; as is held 8 E. 2, *Detinue* 59; 29 Ass. 28; 9 E. 4, 40 b; 3 H. 7, 4 b; 6 H. 7, 12 a. But those books make a distinction between a general and a special bailment; for if a man bail his goods generally, then if the bailee be robbed he is discharged as to the bailor; but when a man undertakes to keep the goods at his peril he shall be charged, though the goods are stolen from him by thieves. And in our case it was a general bailment, in which case the law will not compel the bailee to be more careful and diligent in the custody of these goods than of his own; wherefore the theft of the goods discharges him. And though the thief was his servant, it is no way material; for no doubt a man may be robbed by his servant as well as by

<sup>1</sup> This report is contained in a volume of manuscript reports of cases in the Queen's Bench, 42-45 Elizabeth, now in the library of the Harvard Law School. It was formerly among the Phillips Manuscripts, No. 7040.

another, and this by the common law as well as by the statute of 21 H. 8. As in 21 H. 7, 14, if a butler who has his master's plate in his care runs away with it, it is felony. Wherefore it seems that the plea in bar is good, and the replication does not avail.

*Pynde* to the contrary. The bailment here is strong for charging the defendant; for the plaintiff bailed him the goods to keep safely, so he ought to keep them at his peril. And it is not as if he had taken the goods to keep as his own goods, in which case if he had been robbed of them and of his own goods he should be discharged as to the bailor. And it is not all one whether the defendant is robbed by another thief or by his own servant; for when he is robbed by his servant the law imputes default to him, because he should see to his servants. As in 22 H. 6, 22, if a man be lodged in a common inn and bring with him one of his servants or another man who robs him of his goods, the innkeeper shall not be charged. For which reason it was adjudged, 41 Ass. 12, if the sheriff have a man in his custody to return on an exigent, and bail the writ to another, who is robbed by the man who is in custody on the exigent, the sheriff shall be charged for the embezzling of the writ, and shall not be discharged by the robbery, since it was committed by the man in his custody, for it was a default in the sheriff to suffer him to go at large. And so in a case where the defendant has the government and charge of his servants and is robbed by them, this is a default in him which shall not turn to the disadvantage of the plaintiff. Wherefore, etc.

GAWDY, J. *Acc.* This is not a special bailment, whereby the defendant accepts the goods to keep as his own goods, but it is a bailment which charges him to keep them at his peril. And it is no plea in a writ of detinue to say that the defendant was robbed of his goods by such a one; for though a man take goods feloniously, yet there is no doubt that the owner may bring a writ of trespass and recover his damages. Likewise the defendant in this case, though he had no property in the goods, may have an appeal. So that he has a remedy over, to recover the goods or damages for them, if he will pursue it. And this is especially so in this case, for it does not appear in the whole case that the thief was impeached for the felony at the Queen's suit. If that had appeared it would make the case stronger for the plaintiff, since he would have no remedy over for the goods against the felon. And in proof of his opinion he cited 33 H. 6, 1, where this difference is agreed: if the enemies of the king break a prison and let the



prisoners at large, the warden of the prison may discharge himself for the escape; but if the prison be broken by traitors or rebels it is otherwise, because he has a remedy over against them, and it was his fault that he did not guard them more carefully. And so it seems that the bar is not good.

It still remains to see whether the replication is good; for if not, though the bar is otherwise insufficient, since the demurrer is joined on the replication, and the plaintiff's pleadings should be perfect and sound in every point, he shall not have judgment, as was held in Southwell and Dauntrey's Case, in 2 Eliz. But he held the replication to be good, and so the plaintiff should have judgment.

Quod CLENCH, J., concessit. Wherefore (absentibus ceteris),  
*Judgment for the plaintiff, nisi aliquod dicatur in contrario  
 die Veneris proximo.*

And note, that it was moved by counsel for the defendant that the plaintiff's protestation in his replication was bad, because it was taken to the substance of the bar and he might take issue on it; and also because by his plea he confesses matter which is contrary to his protestation. And it was agreed by the court and not denied by the plaintiff's counsel. And Creisbrook's Case in the Commentaries, 276 b, was cited in proof of this. But since the defendant had demurred generally he lost the advantage he might have taken because of the imperfection of the protestation.

*Et adjournatur.*

The plaintiff seems to have discontinued at this point. A diligent search of the records has failed to discover an entry of judgment.

This report resembles that by Croke. The statement of facts differs slightly in form; the opinion as published in Croke's reports is nearly identical, except that the point of pleading is much abridged. Coke's statement of the case, on the other hand, is almost identical with the present one; but the opinion of the court, as he states it, is very different. He cites eleven authorities in the discussion, while upon this point, according to this report and Croke's, the court cited but one (see what Professor Gray says of Coke's responsibility for the multiplication of citations, 9 HARVARD LAW REVIEW, 38) These authorities he elaborately distin-

guishes. Truly, as Lord Holt said, "My Lord Coke has improved the case in his report of it." On the other hand he omitted all reference to the point of pleading. Both reporters omitted the argument of counsel.

The Court of King's Bench was divided at this time on questions arising out of the law of bailment, Gawdy and Clench (the judges whose *obiter* opinion is here given) being on one side, and Popham and Fenner on the other. Woodlife's Case, Moore, 462; Mosley v. Fosset, Moore, 543. The force of their *dictum* on the liability of a general bailee is weakened by this fact, and also by the fact that their *dictum* on the question of pleading is obviously incorrect.

If Southcott's Case was ever accepted by the bar, in the form in which Coke reported it, as law, it was overruled by the whole court in Coggs v. Bernard, 2 Ld. Raym. 1909 (1703). POWELL, J., said:

"Let us consider the reason of the case, for nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Ed. 4, 40 b, there is such an opinion by Danby [then at the bar]. The case in 3 H. 7, 4, was of a special bailment, so that that case cannot go very far in the matter. 6 H. 7, 12. There is such an opinion, by the by. And this is all the foundation of Southcote's Case." HOLT, C. J., said: "The case in 3 H. 7, 4, is but a sudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has been always at Guildhall to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's case, heretofore, I was not so discerning as my brother POWYS tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered and digested that matter. . . . There is neither sufficient reason nor authority to support the opinion in Southcote's case."

From the time of Coggs v. Bernard Southcott's Case was forgotten, save for a brilliant discussion by Sir William Jones (Bailments, p. 41). He points out that the case arises on a declaration stating that the goods were to be safely kept, and that the opinion is given upon "such a delivery." "Had the reporter stopped here, I do not see what possible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit which has occasioned so many reflections on the case itself: namely, 'that to keep and to keep safely are one and the same



thing.' . . . It must be allowed that his profuse learning often ran wild, and that he has injured many a good case by the vanity of thinking to improve them."

Judge Holmes (*The Common Law*, p. 178), on the other hand, attempts to reinforce his scholarly discussion of the law of bailments by the citation of Southcott's Case. This seems to be the only citation of the case with approval since it was decided. See 11 HARVARD LAW REVIEW, 161.

*J. H. Beale, Jr.*

# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

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SECURED CREDITORS OF A NATIONAL BANK.—The recent case of *Merrill v. National Bank of Jacksonville*, 19 Sup. Ct. Rep. 360, before the Supreme Court of the United States, is notable both because of its practical importance and the care and thoroughness of the opinions. The question, on the merits, was whether a secured creditor of an insolvent national bank should receive dividends *pro rata* to his original claim without regard to his security,—subject always to the proviso that his claim should cease when from the dividends and disposal of the security he should have been paid in full,—or whether the dividends should be *pro rata* to the balance of his claim after disposing of the security. It was admitted that he might throw up the security and prove for the full amount of the claim if he so chose.

The National Banking Act of 1876, Revised Statutes, § 5236, provides that in such cases "the comptroller shall make a ratable dividend" on all recognized claims. The question turned then on the meaning of "ratable dividend." The majority of the court held that this act, in the absence of specific provision, left equity free to administer the assets according to the ordinary "chancery rule" and allow the creditor to prove his original claim and receive dividends *pro rata* to that entirely without reference to his security. *Prima facie* that seems right and the view gets some countenance from the case of *Scott v. Armstrong*, 146 W. S. 499, where the same statute was construed to allow a creditor of a national bank a right of set-off though there was no specific provision in the act to that effect.

The view of the minority—most clearly stated by Mr. Justice Gray—rests on the interpretation of like provisions in preceding statutes. Under every statute regarding bankruptcy, English and American, from 13 Eliz. c. 7, § 2, it has been the uniform practice to allow the secured creditor who chooses to hold on to his security to prove only for the balance of his claim, and most of those statutes have been without specific provisions in that regard. The course of the American statutes gives a most telling



argument. The bankrupt Act of 1800 provided particularly for secured creditors, — the Act of 1841 omitted that provision yet the practice under it was the same. And more, the argument regarding set-off, *Scott v. Armstrong supra*, is nullified by the fact that set-off was allowed under all these statutes, which like the National Banking Act contained no provision in regard to it.

Although the wording of the bankruptcy statutes was not precisely the same, in the face of the unbroken course of judicial interpretation the decision of the principal case seems wrong. It was pointed out that all these statutes dealt with bankruptcy. That tends to weaken the argument, but it still seems conclusive; it is not apparent why bankruptcy statutes stand on any peculiar ground.

Mr. Justice White — Mr. Justice Harlan, and Mr. Justice McKenna concurring — urged also another line of argument: that, granting that the National Banking Act did not apply, still equity in making its distribution should follow the "bankruptcy rule" in analogy with the statutory provisions and to secure uniformity. It seems that the majority had much the better of this branch of the case. It is hard to see why on the merits the "bankruptcy rule" is the juster of the two, — why should not the secured creditor get the full advantage of his diligence and hold the security entirely apart from his legal claim? At best there is no great preference between the rules. And it is quite clear that the equity which the Supreme Court is to administer, as they have repeatedly declared, is to be founded on the principles of the Courts of Chancery, not to be dependent on valuable statutes. The court might be guided by them in contriving some new method of administration, hardly to alter an old one, and even in America the "chancery rule" of distributing the assets without regard to the securities held must be considered the settled equity practice.

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ALIENATION OF AFFECTIONS. — Under the common law a married woman was unable to maintain an action against a third person for alienating her husband's affections; that could hardly be said to have been an unjust discrimination against the wife, for there were two decisive — though somewhat technical — reasons for the doctrine. In the first place the husband would have been required to bring the action and was himself *in pari delicto*, as it were; and secondly the damages recovered would have become his property. It is evident that neither of these reasons apply under our modern statutes enlarging the rights of married women, yet the wife was denied such an action by the Supreme Court of Maine in *Morgan v. Martin*, 42 Atl. Rep. 354 (Me.). The court recognized that there were no technical difficulties in the way of the suit and based their decision on grounds of policy. The wife has an adequate remedy in divorce, and such actions "seem to be better calculated to inflict pain upon the innocent members of the families of the parties than to secure redress to the persons injured." This reasoning, however, does not seem convincing. It puts the burden of the wrong on the husband who may, in some cases, be a comparatively innocent party. And it may well be doubted if divorce would be in many cases either an adequate or a desirable remedy. It would be attended with equally painful consequences to the families of the parties, especially if there were children, with the lamentable result that a substantial injury would often go unredressed. Such seems to be

the opinion of many of the courts; the woman's side of the question is ably presented in *Warren v. Warren*, 89 Mich. 123.

It will be noticed that a parity of reasoning would deny such an action to the husband also, and the Maine Court intimates very consistently, that such is their opinion. But there is absolutely no authority for such a view which seems wholly indefensible. In the husband's case it is clear that divorce would be a totally inadequate and undesirable remedy. Even where the conduct of the wife would be sufficient grounds for separation—which is improbable, even in many cases where the husband has suffered substantial damage—we have the extraordinary result that the sole resource of an injured husband is to put himself into a position where a second injury is impossible, no matter how undesirable to him such a change may be,—the wife bears the whole burden of the wrong, and the true wrongdoer escaping absolutely free! It may be well doubted if any court of to-day would reach such a conclusion. But these reasons apply equally, though perhaps not so strongly, to the woman's case. And this discrimination between the husband and the wife, wholly unjust and contrary to the spirit of all our recent legislation, should fall now with the technical reasons for its existence.

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DEFENCES IN STATUTORY CRIMES.—It is a disputed question whether the common law ingredient of intent is necessary in a crime, the origin of which is purely statutory. That each criminal enactment is a direct repeal of the common law on its particular subject, and that the offence is complete if the bare words of the statute are satisfied, is one prevailing view. Another theory is that such legislative interference is not a repeal, but merely a modification of the common law to the extent of the words of the enactment. All defences, then, which were good before it was passed are to be regarded as still effectual, unless the words of the statute expressly negative their application. Between these two extreme views there is a middle one which commends itself as a convenient rule. To certain offences, such as police regulations, in their nature mere torts against the State, to a conviction of which no moral obloquy attaches, intent may well be considered irrelevant. 12 HARVARD LAW REVIEW, 568. But to the more serious statutory offences justice requires that a defendant may plead successfully all defences not expressly negated by the legislature. *Regina v. Tolson*, 23 Q. B. D. 168. And in such a grave statutory crime as bigamy the defendant should be able, as at common law, to avail himself of a mistake of fact, but by an inflexible rule could take no advantage of a mistake of law.

The Supreme Court of Arkansas have overlooked this view of practical justice in the recent case of *Russell v. State*, 49 S. W. Rep. (Ark.). To an indictment for bigamy under the usual statute the defendant pleaded that he acted in the *bona fide* belief that he had been divorced from his first wife. He claimed that he had paid an attorney money to secure a separation, and had received through fraud a void certificate of the annulment of the marriage. The court, in holding that this evidence was properly excluded below, drew no distinction between a mistake of law and a mistake of fact. They evidently went to the extreme of saying that if the words of the statute are satisfied the defendant was guilty. Whether the result they reach is to be commended depends on the ques-



tion whether Russell was laboring under a mistake of fact or one of law. The report is unfortunately too scanty for a clear decision. And the question is perplexing enough when it is noticed that all law from the point of view of its existence is a question of fact. It may be stated generally, however, that if with full knowledge of the facts one is in error as to the true rule of law to be applied, or if, laboring under an erroneous impression that a certain state of facts exist, one is in error as to the true rule of law to be applied to those supposed circumstances, the mistake is one of law. Otherwise it is a mistake of fact. If, then, in the present case the defendant erroneously thought that this certificate of divorce without more was a legal annulment of his marriage by the law of Arkansas, he was certainly to be convicted. If, however, he was led to suppose through fraud that a proper course of legal proceedings had taken place, a pure mistake of fact negating a criminal intent should have led to his acquittal.

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CONSTRUCTIVE MURDER. — It has been accepted generally as a correct rule of law that one attempting to procure an abortion by means of drugs or instruments is guilty of murder if the woman dies as a result of such attempt. The rule is concisely stated in 1 E. P. C. 264, and has been since approved or followed in the English cases. *Rex v. Russell*, 1 Moo. C. C. 356; *Reg. v. Gaylor*, Dears. & B. C. C. 288. On this side of the water the understanding seems to be substantially the same. *Commonwealth v. Keeper of Prison*, 2 Ashm. 227. In *Commonwealth v. Parker*, 9 Met. 263, the view is clearly expressed that when an attempt of this kind is made either by administration of drugs or by application of instruments the one making the attempt is guilty of murder if the death of the woman ensues. Nor will the consent of the victim remove the imputation of malice in an act unlawful in purpose and dangerous to life.

In the face of so sound a principle the proceeding of Mr. Justice Darling at the Chester Assizes on March 6th is noteworthy. He had under consideration the facts in the case of one Upton, noted in L. T., March 11th, 1899. The defendant was charged with the murder of a woman whose death was the result of an attempted abortion. The prisoner was clearly within the law, but the Court without questioning the validity of the rule advised the Grand Jury not to return a true bill for murder if they thought that the wound was inflicted by the defendant with the intention only of procuring the abortion and with no intention or desire in any way to effect the death of the woman. The ground on which such directions were justified was dependent wholly upon the previous experience attendant upon convictions of persons for this form of crime. Practice had shown that sentence was passed only to be commuted later by reason of the finding that there was no actual intention to murder.

Whatever may be the outcome of this initiative it is not easy to see just how the circumstances call for an interference with the legislative prerogatives by the judiciary. The rule itself is well grounded in reason according to the principles governing the conduct of criminal prosecutions, and the authorities do not dissent in its application. There seems to be no justification then for the adoption of such means to effect so radical a departure.

DEBATES AS AIDS IN INTERPRETING STATUTES. — An interesting question is often raised as to how far courts, in construing statutes, may look into the motives and intentions of the individual legislators. By the general weight of authority the court cannot look into the debates on the statute in question, as this shows merely the intention and interpretation of the individual members of the legislature, which may not of course represent the true object of the majority. *Aldridge v. Williams*, 3 How. 24. This doctrine has been rejected by the New York Court of Appeals in a recent decision, holding that the court may look into the published records of the debates preceding the passage of the act. *People v. Dalton*, New York Law Journal, March 7, 1899.

Such evidence is unquestionably very slight, and possibly misleading, but neither of these objections seems sufficient to exclude it altogether. It would never be referred to except in obscure cases, and even then it would hardly be misleading to the court, trained as they must be in considering and weighing evidence. In adopting the contrary doctrine, courts may have been influenced by that legitimate rule of evidence which excludes declarations of intention of the parties in construing written documents. But this does not rest on the supposition that such evidence of the actual intention and understanding of the parties is not extremely valuable as an aid to interpretation, but on the ground that it is untrustworthy, and likely to be the subject of misrepresentation and perjury. This objection, however, cannot be urged in the principal case. Recitals in statutes, and records of bills presented or finally passed in either house have always been referred to by the courts, yet they differ from the debates only in that they are more likely to represent the view of the majority. *Blake v. National Banks*, 23 Wall. 307. Curiously enough, in construing the State constitutions, it has always been held allowable to refer to the debates in the constitutional conventions, yet there seems to be no reason for this distinction. *People v. Harding*, 53 Mich. 481.

The only valid objection to such evidence lies in its slight weight. But this in itself seems insufficient to warrant any fixed rule of exclusion. Such rules were made for the benefit of the jury, an untrained body of men, likely to be misled by such evidence, — a reason which does not apply to the court. And the principal case seems to lay down the more sensible and better doctrine, that the court may look into all the evidence it can find, trusting to its own prudence and experience not to be unduly influenced.

THE TACKING OF ADVERSE HOLDINGS. — The question, whether successive adverse holders may fulfil the statutory requirement of twenty years' adverse possession by tacking their periods of occupancy to divest the land owner of his title, has been passed on by the Supreme Court of Massachusetts. In *Frost v. Courtis*, 52 N. E. Rep. 515 (Mass.), the respondent, having been in possession of the disputed land under a void devise, conveyed by deed to one Morse. The court, following *Sawyer v. Kendall*, 10 Cush. 241, declared that, if the combined periods of possession of the respondent and Morse equalled twenty years, the true owner was deprived of his title. In *Sawyer v. Kendall*, *supra*, the wife of the plaintiff's disseisor endeavored to tack her husband's possession to her own in order to satisfy the statute. But it was ruled that where there was no privity of estate between successive wrongful holders, the privilege of tacking would not be allowed. In the principal case sufficient privity



was found in the deed of conveyance from the respondent to Morse. If, however, the second holder instead of taking a conveyance had in turn disseised the first disseisor, the doctrines of tacking could not have been invoked.

The Massachusetts view has commanded general acquiescence. *Overfield v. Christie*, 7 S. & R. 173. It would seem that the term, "privity," between the disseisor and his grantee, could only be satisfied by a devise or conveyance which would be effectual to transfer the land had the grantor a perfect title. But it has been held illogically in some jurisdictions where "privity" is required, that a defective deed, or even a mere oral transfer, is sufficient. *Weber v. Anderson*, 73 Ill. 439. It is to be noted, however, that Massachusetts adheres to a strict interpretation of the test it has laid down. *Ward v. Bartholemew*, 6 Pick. 409. But is not this rule a purely arbitrary check? It is hard to see why a second disseisor should not be allowed to add to his term that of his immediate disseisee to protect himself against the procrastinating owner. It has been argued that the seisin of the proprietor revives, and that a new disseisin is effected by the later disseisor. But unless there is a distinct interval between the two occupancies, the seisin of the first wrongdoer passes directly to the second. Moreover, it seems that the case should be looked at from the point of view of the person who brings suit. If his laches has been continuous for the necessary period, the spirit of the Statute of Limitations seems to require his failure. And there is authority for this position. *Fanning v. Willcox*, 3 Day, 258. Speaking broadly, then, where possession has been continuously adverse to the true owner for twenty years, "privity" of successive occupants is irrelevant. 9 HARVARD LAW REVIEW, 279.

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COVENANTS RESTRICTING THE USE OF CHATTELS.—The so-called doctrine of equitable easements—that covenants restricting the use of land will bind a purchaser with notice—has been extended by a recent decision of the New York Supreme Court to covenants restricting the use of chattels. A Catholic association, having a copyright on a certain prayer book, sold a set of plates to the plaintiff, and covenanted not to sell below a certain price copies from the plates which they retained. The association afterwards disposed of their set of plates to the defendant who had notice of the covenant. The defendant having sold books below the stipulated price was enjoined from so doing and was forced to pay damages to the plaintiff. *Murphy v. Christian Press Association*, New York Law Journal, March 15, 1899. The court reasoned that there was no difference in principle between a covenant concerning land and one concerning chattels, and that this particular covenant was not in restraint of trade, since it referred to the use of a copyright. It cannot be doubted that this reasoning is correct. While the defendant was not of course liable on the covenant itself, his conscience was affected by his notice, and in equity he stood in no better position than his vendor. The only question in such a case would seem to be, whether the vendor himself could have been enjoined from breach of his contract. As to this point, the principal case is undoubtedly correct, for agreements as to the use of copyrights can generally be enforced specifically, owing to the inadequacy of any legal remedy. High, Injunctions, § 1171.

As regards personal property, equity will rarely decree specific performance of a contract of sale, and *a fortiori* it will not enforce a covenant

as to the use of chattels, since there is ordinarily a sufficient remedy at law. And as to those chattels which are recognized in equity, shares of stock, for example, a restriction on their use would generally be in restraint of trade, — an objection escaped in the principal case only because the covenant related to the use of a copyright which is itself a monopoly. Moreover, considerations of commercial expediency have led some courts to protect purchasers of chattels, even with notice, though a bill for specific performance would have been sustained against the vendor; as, for example, where the purchaser with notice of a prior mortgage of all subsequently acquired property, is protected, though a bill for a new legal mortgage could have lain against his vendor. *Moody v. Wright*, 13 Met. 17; *Hunter v. Bosworth*, 43 Wis. 583. Whether the principal case would be followed in such jurisdictions, on the ground that patents and copyrights are peculiarly favored in equity, seems somewhat doubtful. These considerations probably account for the surprising lack of authority on the point, which itself seems to indicate that the principal case is of more theoretical than practical interest.

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REVOCATION OF LICENSES. — A distinction is made at common law between a parol license given to do something on the land of the licensor and a parol license to do an act on the licensee's own land inconsistent with some easement of the licensor. In the former the legal effect of the permission is merely to excuse the trespass, though the enjoyment of the privilege till the license is withdrawn gives an interest not unlike an easement. In the latter the legal effect is to extinguish an already existing easement. The rule as to the revocation of these licenses is in some respects clear. Until they have been acted upon both may be recalled at will. When the effect of the license is to extinguish an easement it is irrevocable if acted upon. *Morse v. Copeland*, 2 Gray, 302. If, however, permission has been given to do something on the land of the licensor, and expenditures have been made in reliance on it, the common law allows the licensor to withdraw the license. *Fentiman v. Smith*, 8 East, 308. The difficulty arises in the apparent injustice to the licensee in this class of cases. In some cases equity will interfere on the ground of equitable estoppel, and refuse to permit the revocation. *Rerick v. Kern*, 14 S. & R. 267, though a decision at law has been followed in the courts of equity in some states.

A recent decision has refused to apply the doctrine of estoppel when the effect would be to create an easement. *Great Falls Waterworks Co. v. Great Northern Ry. Co.*, 54 Pac. Rep. 963 (Mont.). The plaintiff, by parol license, laid watermains across land of a town-site company and used them for more than six years. Part of the land was conveyed to the defendant, with notice of the existence of the pipes. Subsequently the railway company attempted to remove the mains, and the plaintiffs asked for an injunction to restrain them. The court, in refusing relief, disapproved of estoppel as defeating the common law policy regarding the creation of easements.

Whether or not equity ought to grant an injunction, which has the practical effect of creating an easement on the licensor's land in favor of the licensee, depends in the first instance on the circumstances under which the license is given. If there is an agreement, on the basis of



which the execution of the license may be regarded as part performance, there is good reason to support the doctrine of irrevocability. If, on the contrary, as in the principal case, there is no contract which may be made the ground for a decree of performance, it is not clear how equity can give effect to a mere license, — which is at best only a gratuitous promise. In some cases it is said the result would be harsh to the licensee who has acted in good faith on the strength of the license; but the ground of hardship alone is hardly strong enough to support a general rule, especially in view of the important results which follow the application of the doctrine of estoppel. The decision of the principal case, then, seems clearly right.

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CONVERSION OF PLEDGE.— Whether trover will be against a pledgee who has illegally disposed of the security, before any tender of debt or demand for return of the pledge, has been decided in the affirmative by the case of *Feige v. Burt*, 77 N. W. Rep. 928 (Mich.). The pledge was in the form of certificates of stock deposited with the defendant bank to cover a debt which was not met at maturity. The bank tortiously sold the certificates without notice to the pledgor, and appropriated the proceeds. The depositor thereupon, without tender of the amount or demand for return of the stock, sued the pledgee in trover for conversion of the pledge. The case turns upon a point about which there is still a conflict of authority. See 9 HARVARD LAW REVIEW, 540.

The English rule may be taken as settled that trover will not lie against a pledgee who has parted with the pledge unless tender has been made. *Halliday v. Holgate*, L. R. 3 Ex. 299. This case is considered as overruling the earlier one of *Johnson v. Steare*, 15 C. B. N. s. 330, where the action was allowed, but the amount of damages was diminished to the extent of the pledgee's interest on the theory of compensation. The various jurisdictions in the United States are not uniform in their rulings, and both views suggested by the English cases are sustained. *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321, agrees with the rule of *Halliday v. Holgate*, *supra*. *Neiler v. Kelley*, 69 Pa. St. 403, however, on a similar state of facts declares the law to be the same as in the principal case. It may fairly be said to represent the view opposed to the accepted English doctrine of to-day.

It is a question, then of choosing between these conflicting views. In favor of not allowing the action it may be said that until the pledgor makes tender of the amount for which he has pledged the security, it is manifestly impossible to allow him to maintain trover, which depends upon the plaintiff's right to immediate possession. But is it not logical to say, as the court does in the principal case, that in event of a tortious sale by the pledgee, the pledgor is put in a position where a tender, if made, would be nugatory? The right of the pledgee to make certain uses of the security may be admitted; and yet it is not at variance with this to argue that the pledgor should have such an interest as to defeat an illegal dealing by the pledgee, the ultimate result of which would be to divest him of his title. Moreover, the recognition of such an interest in the pledgor does not conflict with the requirements of commercial convenience, since the pledgee has it in his power to effect his ends by methods strictly lawful.

HEARSAY EVIDENCE IN MATTERS OF PUBLIC OR GENERAL INTEREST. — For many years it has been the custom of English courts to allow hearsay evidence on a matter of public or general interest. Questions as to political boundaries, or public prescription, matters of public concern affecting the entire nation, may be established by hearsay evidence. And even a matter of general interest, which affects the whole or part of a single community, such as manor boundaries or rights of common, are treated in the same way. But the English courts do not extend the exception to the hearsay rule so far as to allow private affairs to be thus established. It is true that the subject of prescription in general, whether public or private, was until the end of the last century supposed to be susceptible of proof by reputation. But *Dunraven v. Llewellyn*, 15 Q. B. 1811, declared in 1850 that it was the settled rule that private prescriptions could not be shown in this way. The American law in many of the States goes further in allowing private boundaries to be defined by reputation. *Morton v. Folger*, 15 Cal. 275 (Supt. Ct.). The intricate skein of individual rights in our early settlements of land could rarely be disentangled except by such a medium of proof. And this doctrine may be traceable to the older English rule as regards private prescription.

The method of proof in a matter of public or general concern formerly consisted in showing what was its reputation in the community *ante litem motam* and this reputation had to be traditionary, not that which was merely current at the time. Formerly when the jurors had a right to go upon their own knowledge, they were expected in a question of antiquity to rely on what had been handed down to them from their fathers. And the application of the older methods is but natural when the jurors are listening to the testimony of a witness as to what he himself heard. Thayer, *Cases on Evidence*, p. 420, note 1. To-day, however, under the guise of reputation, it is stated that the specific declarations of a deceased person are admissible to establish a matter of public or general interest.

The question whether hearsay evidence was admissible in a matter which concerned a number of persons has recently been presented to the Court of Appeal in England in *Evans v. The Urban District Council of Merthyr*, 79 L. T. Rep. 578. On the issue whether a certain bit of land was common land or subject to any commonable rights, either of the commoners of the parish of Cantreff or of the commoners of the parish of Llanfrynach, it was held that evidence of reputation was admissible. It must be taken that the reputation was such as was traditional in the community. Therefore the decision is clearly correct. Disputes as to manor boundaries and manor rights arising frequently in England, such an exception to the rule against hearsay is of much practical value. And the extended rule in America is well suited to a country where vast tracts of land are rapidly being settled.

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## RECENT CASES.

AGENCY — UNAUTHORIZED CONTRACT — LIABILITY OF PRINCIPAL. — The plaintiff as agent for the defendant, without disclosing the existence of his principal, entered into an unauthorized contract for the sale of fruit, which the defendant later approved, but failed to carry out. The plaintiff being compelled to perform his agreement, *held*, that he was entitled to recover his commission, but not his expenses in fulfilling the contract. *Delafield v. Smith*, 78 N. W. Rep. 170 (Wis.).



The conclusions of the court appear quite inconsistent. Generally where a principal with full knowledge of the circumstances ratifies an unauthorized act of his agent he is bound thereby as fully as if he had originally authorized the act. *McLean v. Dunn*, 4 Bing. 722. If the ratification is made in ignorance of some material circumstance he may on learning all the facts disaffirm the act. *Combs v. Scott*, 94 Mass. 493. If the defendant in the principal case had a right to disaffirm the contract after the ratification, which does not clearly appear, he should not have been held liable to the plaintiff even for the commission. If the ratification was binding upon him he should have been held liable for both commission and expenses.

**BANKRUPTCY—ACT OF BANKRUPTCY.**—A creditor obtained judgment and satisfaction against an insolvent debtor, judgment going by default. *Held*, that the debtor had committed an act of bankruptcy by "suffering or permitting a preference through legal proceedings." *In re Reichman*, 91 Fed. Rep. 624 (Dist. Ct. Mo.).

Section 3 of the Bankruptcy Act of 1898 provides that it shall be an act of bankruptcy to "suffer or permit" a preference through legal proceedings. The corresponding section, § 39, of the Act of 1867 was identical; but section 35 of the same act provided that this preference must be "procured by him." Much confusion resulted. The lower courts held that the mere fact of judgment suffered was sufficient under section 39. *Buchanan v. Smith*, 8 Blatch. 153. But the Supreme Court by construing the whole statute held that the bankrupt must be active. *Wilson v. City Bank*, 17 Wall. 473. Inasmuch as the provision of section 35 of the Act of 1867 is not included in the Act of 1898, the way is clear to distinguish the latter case and to follow the former. The words may then be applied in their ordinary signification. In the principal case the debtor might have prevented judgment by filing his petition in bankruptcy. Accordingly, it is correctly held that he "suffered or permitted" the preference. *In re Gallinger*, 1 Saw. 224; *In re Sutherland*, Deady, 344.

**BANKRUPTCY—PROPERTY VESTING IN THE TRUSTEE.**—*Held*, that the right of action for damages for a malicious prosecution suffered by the bankrupt does not pass to his trustee in bankruptcy. *In re Huensell*, 91 Fed. Rep. 355 (Dist. Ct. Cal.).

Section 70 of the Bankruptcy Act of 1898 provides in general terms that rights of action of the bankrupt shall pass to the trustee. The law follows in this respect section 14 of the Bankruptcy Act of 1867. Under that provision it was always held that rights of action for personal torts did not vest in the trustee. *Noonan v. Orton*, 34 Wis. 259; *Dillard v. Collins*, 25 Grat. 343. The decisions under the English Bankruptcy Laws are to the same effect. *Howard v. Crouther*, 8 M. & W. 601; *Wetherell v. Julius*, 10 C. B. 267. Such rights of action although within the letter are not within the spirit of bankruptcy statutes. The sole object of these laws is to seize and distribute the estate of the bankrupt. Then, the one test to determine whether a right of action passes should be whether the injury in question directly diminished the estate of the bankrupt. Torts to property do so diminish the estate; torts to the person do not. *Hodgson v. Sidney*, L. R. 1 Ex. 313; *Rogers v. Spence*, 13 M. & W. 580. In the principal case the tort is clearly personal; and the decision therefore unexceptionable.

**BILLS AND NOTES.—INTERLINEATION—PRESUMPTIONS.**—An interlineation on the face of a note appeared to have been made with the same ink, in the same handwriting, and at the same time as the note. *Held*, that the presumption is that the alterations were made before delivery. *Muldaner v. Smith*, 78 N. W. Rep. 140 (Wis.).

In accord with the reasoning of the principal case it has been held that any alteration is *prima facie* presumed to have been made before delivery. *Franklin v. Baker*, 48 Ohio St. 296; *Wilson v. Hayes*, 40 Minn. 531. Other cases hold that any alteration, whatever its character, is presumed to have been made after delivery and that this presumption can be rebutted only by extrinsic evidence. *Knight v. Clement*, 8 A. & E. 215; *Citizens' Nat. Bank of Baltimore v. Williams*, 174 Pa. St. 66. It seems a simpler and a better view to say there is no presumption either way. *Hagan v. Merchants & Bankers' Ins. Co.*, 81 Iowa, 321. The pleadings will then determine on whom rests the burden of explaining the alteration. If the plea is *non assumpsit* the jury must be satisfied from the appearance of the note, or from other evidence offered by the plaintiff, that the alteration was made before delivery. If, however, the defendant admits the execution but relies on an alteration made after delivery he must establish that it was so made.

**CONSTITUTIONAL LAW.—EMINENT DOMAIN.—ADDITIONAL SERVITUDES.**—*Held*, that the erection of electric light poles on a country road, the fee of which is in the abutter, is not an additional servitude where the poles are erected for the purpose of lighting the highway. *Palmer v. Larchmont Electric Co.*, 52 N. E. Rep. 1092 (N. Y.).

*Held*, that the placing of telephone poles on a highway the fee of which is owned by the abutter imposes an additional servitude for which compensation must be made. *Nicoll v. New York & N. J. Tel. Co.*, 42 Atl. Rep. 583 (N. J., C. A.).

The distinction, which the former of these cases admits to exist, between the legitimate uses of a country road and of a city street is becoming generally recognized. If it be accepted, great difficulty will be found in its application,—in drawing the line between rural and urban districts. To adopt the incorporation of the town or city as the criterion is not in all respects satisfactory, and any other test is too vague to be acceptable. However, it is admitted that even country highways are subject to the easement of passage; and everything which renders the passage safer or more convenient may be included therein. The erection of poles for purposes of lighting was therefore correctly held to fall within the narrowest definition of a highway. It does not appear whether the poles were to be used for furnishing electricity to private persons. Such fact might be thought to make a difference. *Cf. Bloomfield, &c. Gas Light Co. v. Calkins*, 62 N. Y. 386.

The second of the two principal cases follows the great weight of authority in holding telephone poles to impose an additional servitude. *Crowell, electricity*, §§ 112, 116. But the contrary view has received influential support. *Pierce v. Drew*, 136 Mass. 75. The report does not state whether the highway in question was regarded as rural or urban, if that fact be deemed material.

CONTRACTS.—ACCORD AND SATISFACTION.—*Held*, that where a debtor was insolvent, the receipt of part of the sum due without delay or litigation was good consideration for a release of the balance. *Shelton v. Jackson*, 49 S. W. Rep. 415 (Tex., Civ. App.).

The departure in this case from the well known rule, that payment of part of a debt does not discharge the whole, rests on an arbitrary distinction. The consideration which the court finds for the release in the avoidance of delay and litigation exists in every case where a creditor compromises with a reluctant debtor. The decision is but a fresh illustration of the inveterate hostility of courts, generally, to the technical rule. *Jaffray v. Davis*, 124 N. Y. 164; *Smith v. Ballou*, 1 R. I. 496. In Minnesota the distinction taken in the principal case as to insolvency has been carried to an extreme limit and it has been held that partial payment discharged the debtor where he was thought to be insolvent though it afterwards appeared that he was not. *Rice v. London, etc. Mortgage Co.*, 72 N. W. Rep. 826 (Minn.). The multiplication of such exceptions as these leaves the law in a state of some confusion, but it has the practical advantage of considerably lessening the hardship which would follow a rigid observance of the rule. See 12 HAR. LAW REV. 515, 521.

CONTRACTS.—AUCTION.—At an auction which had been advertised as "unreserved," the plaintiff bid one dollar more than the previous bidder. *Held*, that the auctioneer may refuse the bid since it might not be to the seller's advantage to accept such a slight advance. *Taylor v. Harsett*, 55 N. Y. Supp. 988 (Sup. Ct., App. Term.).

There is a *dictum* in the case to the effect that the auctioneer is to be considered as the offeror, but the weight of authority is *contra* to this position. *Harrod v. Nickerson*, L. R. 8 Q. B. 286; *Spencer v. Harding*, L. R. 5 C. P. 561. Granting its soundness the result reached by the court does not follow, for the offer of the highest bid then completed a unilateral contract, rescission of which by one party was impossible. Though the decision is untenable on the grounds assigned, the result is in accord with what may be regarded as the proper view, namely, that the making of the bid is the offer, and that it is accepted and made a binding unilateral contract by the fall of the hammer. Until that time, therefore, it is not binding on either party, and may be withdrawn by the bidder, *Payne v. Cave*, 3 T. R. 148; or rejected by the auctioneer, *Mainprice v. Westley*, 6 B. & S. 420.

CONTRACTS.—MORAL CONSIDERATION.—The plaintiff by mistake repaired the defendant's house, and the latter, when apprised thereof, promised to pay him. *Held*, that the promise is binding. *Drake v. Bell*, 55 N. Y. Supp. 945 (Sup. Ct., Sp. Term.).

A legatee at the request of the testator promised the latter that he would pay the plaintiff \$1500. *Held*, that the promise is binding. *Lawrence v. Oglesby*, 52 N. E. Rep. 945 (Ill.).

These cases represent two phases of the theory of moral consideration which have received judicial recognition in this country. It has been held that a moral obligation is a good consideration. *Eduards v. Nelson*, 51 Mich. 121; *Holden v. Banes*, 140 Pa. St. 63. Other courts have taken the view that a moral obligation is not a good consideration except when founded on value previously received from the promisee. *Goulding v. Davidson*, 26 N. Y. 604; *Boothe v. Fitzpatrick*, 36 Vt. 681. Neither of these views is consistent with the weight of authority. *Hawkes v. Saunders*, Cowp. 290, on



which both of the principal cases are based, was in effect overruled by *Eastwood v. Kenyon*, 11 A. & E. 438. The latter case is followed in most of the States and the idea that any past or moral obligation can be a sufficient consideration to support a promise has been generally repudiated. *Mills v. Wyman*, 20 Mass. 207; *Freeman v. Smalley*, 38 N. J. Law, 383.

**CONTRACTS — RESTRAINT OF TRADE — LIMITATION AS TO SPACE.** — The defendant covenanted that for twelve months after leaving the employ of the plaintiff he would not engage in the business of a hay or straw merchant within the United Kingdom. *Held*, that the covenant is not void as in restraint of trade, since the restriction is not in excess of what is reasonably necessary for the plaintiff's protection. *Underwood v. Barker*, [1899] 1 Ch. D. 300.

The above decision follows the now settled English law. *Nordenfelt v. Maxim Nordenfelt, etc., Co.*, [1894] App. Cas. 565; see 8 HAR. LAW REV. 355, 359. In a majority of the jurisdictions in this country the test applied in the principal case has been adopted. *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Fowle v. Park*, 131 U. S. 88. However, in certain States the courts consider it against public policy to enforce contracts which will drive a man out of his own State in order to carry on any particular trade. *Lange v. Werk*, 2 Ohio, 520; *Wright v. Ryder*, 36 Cal. 342. As the question is purely one of public policy, the English rule appears more satisfactory. The injury to the public caused by such a personal restriction must be very slight, and therefore the importance of holding parties to contracts entered into *bona fide* seems a prevailing consideration.

**CORPORATIONS — MALICIOUS PROSECUTION.** — *Held*, that a corporation may be held liable in an action for malicious prosecution. *Comford v. Carlton Bank*, [1899] 1 Q. B. D. 392.

The great weight of authority is in accord with this case. *Edwards v. Midland Ry. Co.*, 6 Q. B. D. 287; *Goodspeed v. The East Hadden Bank*, 22 Conn. 530; *Reed v. Home Savings Bank*, 130 Mass. 443. It was formerly thought that a corporation could not entertain malice, because as Lord Bramwell said, it had no mind. *Abrath v. North Eastern Ry. Co.*, 11 App. Cas. 247, 250-51. But a corporation has sufficient legal capacity to make a contract, or plan a railroad. If it is to obtain benefits by means of this capacity, it should also incur liabilities. Of course, malice on the part of an agent, merely, is insufficient. *Lake Shore, etc., Ry. Co. v. Prentice*, 147 U. S. 101. It must be authorized or sanctioned by the corporation, in such a manner as would create liability in an individual principal. *Denver, etc. Ry. v. Harris*, 122 U. S. 597. That done, there seems to be no reason, inherent in the nature of a corporation, which should relieve it from liability for malicious prosecution.

**CORPORATIONS — MUNICIPAL CORPORATIONS — LIABILITY FOR SERVANTS' TORTS.** — *Held*, that the duty imposed by statute of New York City of removing dirt from the streets and ashes and garbage from abutting residences is a quasi-private duty, and the city is liable for the torts of its servants while performing it. *Quill v. Mayor of New York*, 55 N. Y. Supp. 889 (Sup. Ct., App. Div., Second Dept.).

The case refuses to follow *Davidson v. New York*, 54 N. Y. Supp. 51. It is also *contra* to *Love v. City of Atlanta*, 95 Ga. 129. These cases proceed on the ground, that, as the municipality performs such duties for the preservation of the public health, it is exercising a police power delegated to it by the State, and is therefore acting in a governmental capacity. The principal case regards the duty as essentially a private one, resting originally on the individual property owner, and assumed by the municipality merely for the convenience and advantage of its citizens. The latter is certainly the more desirable, and seems also the better view. It is more consistent with the historical development of the assumption of such duties by municipalities, and the result is in accord with the general tendency, shown by recent cases, to broaden the liability of public corporations for the tortious acts of their agents. *Goodnow, Municipal Home-Rule*, 167-183. For a close case in which the opposite result was reached, see 12 HARV. LAW REV. 217.

**CRIMINAL LAW — BIGAMY — DEFENCES** — The defendant was indicted for bigamy under the usual statute. *Held*, that the fact that he was fraudulently induced to believe that a divorce from his first wife had been duly obtained is no defence. *Russell v. State*, 49 S. W. Rep. 821 (Ark.). See NOTES.

**CRIMINAL LAW — INSANITY — BURDEN OF PROOF.** — In a trial for murder, *held*, that when evidence of insanity is introduced by the accused, the burden of proving his sanity is on the prosecution. *Brown v. State*, 25 So. Rep. 63 (Fla.).

All authorities agree that the prosecution can rest on a presumption of sanity till evidence to the contrary is offered. There is, however, considerable conflict as to

where the burden of proof lies after the introduction of such evidence. In the majority of states the accused must establish his insanity. *State v. Lawrence*, 57 Me. 574; *Parsons v. State*, 81 Ala. 577. The principal case, however, takes the better view. *People v. Garbutt*, 17 Mich. 9; *Davis v. United States*, 160 U. S. 469. See 11 HAR. LAW REV. 62.

**DAMAGES — LIQUIDATED DAMAGES — PENALTIES.** — A manager contracted with actors for their services, stipulating that they should pay "a penalty" of \$500 for a breach of the engagement or of any of its conditions. The engagement was broken. *Held*, that the manager is entitled to recover the sum named as liquidated damages. *Pastor v. Solomon*, 55 N. Y. Supp. 956. (Sup. Ct., Appeal Term.)

The court apparently rests its decision on the ground that the stipulated sum was not disproportionate to the breach complained of. The important point that the penalty was also attached to the breach of any one of several subsidiary conditions was dismissed with the remark that the court cannot say that with respect to them, "the amount in question transcends the permissible limit of liquidated damages." But it seems that this very provision should have turned the decision the other way. If a stipulated sum violates the principle of compensation as to any of the conditions to which it is applicable, it should be treated as a penalty. *Kemble v. Farren*, 6 Bing. 141. And if the court is in doubt as to its nature it should hold it a penalty. *Hoag v. McGinnis*, 22 Wend. 163. Moreover, when the contract does not refer to the fixed sum except as a penalty, courts are extremely reluctant to allow it to be recovered as liquidated damages even though it is not otherwise objectionable. *Taylor v. Sandiford*, 7 Wheat. 13; 1 Sedg., Dam. 8th ed., § 410.

**EVIDENCE — CONFESSIONS — QUESTION FOR COURT.** — *Held*, that the question whether a confession was voluntary or not may be left to the jury with proper instructions. *Commonwealth v. Shew*, 42 Atl. Rep. 377 (Pa.).

The principal case represents a not uncommon practice among presiding judges of leaving the confession and the evidence bearing on the manner in which it was obtained to the jury, with directions to disregard the confession if they find it was involuntary. The practice, however, is indefensible on principle. *People v. Barker*, 60 Mich. 277; *Commonwealth v. Smith*, 119 Mass. 305. There are properly two questions in such cases: first, the admissibility or competency of the confession, and, second, the weight to be given to it. The former is always a question for the court, and the latter for the jury. *Commonwealth v. Culver*, 126 Mass. 464. Accordingly, the jury may give no weight to the confession when admitted if they believe it was involuntary; but before admitting it to them the judge should determine that the confession was voluntarily made, for its admissibility depends on that. *Fife v. Commonwealth*, 29 Pa. St. 429; *Ruser v. Egner*, 25 Ohio St. 464.

**EVIDENCE — IMPEACHMENT OF WITNESS.** — A witness summoned by the defendant testified on an immaterial point. He was then called by the plaintiff as witness for him. *Held*, that the defendant may impeach the witness. *Fall Brook Coal Co. v. Hewson*, 52 N. E. Rep. 1095 (N. Y.).

The common law rule, that no one can impeach his own witness, has been largely altered by statute, but still remains in force in New York. *Coulter v. American, etc. Express Co.*, 56 N. Y. 585. In accord with the early English decisions the principal case holds that no one becomes a witness within its meaning until he has given testimony material to the issue. *Creevy v. Carr*, 7 C. & P. 64; *Wood v. Mackinnon*, 2 Moo. & R. 273. The rule itself rests on the theory that the party who summons a witness in effect guarantees his veracity, and should therefore be estopped from proving him untrustworthy. *Selover v. Bryant*, 54 Minn. 434; *Pollock v. Pollock*, 71 N. Y. 137. But at best this reasoning is artificial and unsatisfactory. 11 Am. Law Rev. 261. Accordingly the principal case may well be supported in limiting the application of the general rule, and allowing the party who summons a witness to impeach such witness when he has not contributed to the support of his case.

**EVIDENCE — MALICIOUS PROSECUTION — QUESTION FOR COURT.** — In an action for malicious prosecution, *held*, that the question, whether or not the established facts of the case constituted probable cause, was properly submitted to the jury. *Owens v. New Rochelle, etc. Co.*, 55 N. Y. Supp. 913 (Sup. Ct., App. Div., Second Dept.).

In determining the question of probable cause in an action for malicious prosecution, it is the almost universal rule that the function of the jury is merely to find from the evidence what are the ultimate facts, while the duty of applying the law to such facts is exclusively for the court. *Panton v. Williams*, 2 Q. B. 169; *Smith v. Munch*, 65 Minn. 256; 2 Thompson, Trials, § 1618. The explanation of this doctrine, which is a departure from the usual mode of distinguishing between the functions of the court and jury, is chiefly historical. Thayer, Prelim. Treat. Ev. 221-231. In actual practice



the rule has a beneficial effect. It avoids the danger that the jury may indulge an unjust prejudice, which it is very apt to entertain against a defendant in this action. The holding in the principal case, then, can hardly be justified. It probably resulted from a misconception of the law as laid down in former New York decisions. *Cf. Beeson v. Southard*, 10 N. Y. 236; *Heyne v. Blair*, 62 N. Y. 19.

**EVIDENCE — PAROL EVIDENCE RULE.**—In an action on a bond of indemnity the defendant wished to show that it had been given upon an unfulfilled promise by the plaintiff to notify the defendant promptly of any default by the principal debtor. *Held*, that the evidence is inadmissible. *Mason & Hamlin Co. v. Gage*, 78 N. W. Rep. 130 (Mich.).

The case is undoubtedly correct. It is a general rule that parol testimony cannot be received to add to or subtract from the terms of a written contract. *Angell v. Duke*, 32 L. T. Rep. N. S. 320. This is founded on a presumption that the parties have included all the terms and conditions in the writing. The case, therefore, is governed rather by a rule of the substantive law of contracts than by a rule of evidence. It is permissible, however, for the obligor to show that there was a condition precedent to the contract taking effect. This is not adding to the agreement but showing that in fact there was no contract. *Pym v. Campbell*, 6 E. & B. 370; *Earle v. Rice*, 111 Mass. 17. In the present case, however, the agreement was binding when made, and the defendant wished to show that later, owing to a condition subsequent not contained in the writing, it had become void. To allow this would certainly be to vary the terms of the contract. *Beard v. Boylan*, 59 Conn. 181; *Aultman & Taylor Co. v. Gorham*, 87 Mich. 233.

**INSURANCE — WARRANTY — CONSIDERATION.**—The insured in a policy of fire insurance, agreed to keep a complete record of his business and to deposit his books in a fireproof safe at night. *Held*, that the agreement was without consideration and void, and a failure to perform it did not bar a right of action upon the policy. *Mechanics' & Traders' Ins. Co. v. Floyd*, 49 S. W. Rep. 543 (Ky.).

The contract was unilateral, and the payment of the premium was the whole consideration for the assumption of the risk by the insurer. After that nothing remained to be done by the insured which required consideration. *Worsley v. Wood*, 6 T. R. 710. The so-called warranty or covenant by the insured was in the nature of a condition precedent in effect, but subsequent in form, and should have been literally performed by the insured to entitle him to recover. *Leroy v. Market Fire Ins. Co.*, 39 N. Y. 90. Unlike a warranty made by the vendor of a chattel it was not a collateral agreement. A failure to observe this distinction has led the court in the principal case into error. Moreover, the parties here expressly stipulated that the insurer should not be liable upon the policy if the insured did not perform the agreement—a point which the court apparently overlooked. The case seems unsound in any point of view.

**INTERPRETATION OF STATUTES — INTERNAL REVENUE — REBATE OF TAX.**—Sec. 61, c. 349 of the Acts of Congress for 1894 provides that any manufacturer finding it necessary to use alcohol in the arts, etc., "may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector . . . that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive" repayment of such tax. No regulations were made by the Secretary. The plaintiff used alcohol in the arts; tendered to the collector evidence of such use, together with stamps showing payment of the tax thereon; and requested the collector to visit the factory and satisfy himself that the alcohol had been so used. *Held*, that the plaintiff is not entitled to repayment of the tax, since the making of the regulation is a condition precedent to the existence of any right of rebate. *Dunlap v. United States*, 19 Sup. Ct. Rep. 319. Brown, White, Peckham, and McKenna, JJ., dissenting.

The decision is an interesting and important one to commercial interests. It is a little difficult to see why the wording of the statute required the construction put upon it by the majority of the court, especially as the result is to destroy all effect of the act, since the Secretary has found it impracticable to make the necessary regulations.

**NATIONAL BANKS — SECURED CREDITORS.**—*Held*, that under the existing National Banking Act secured creditors of an insolvent national bank are entitled to dividends *pro rata* to their original claims without regard to the securities held. *Merrill v. Nat. Bank of Jacksonville*, 19 Sup. Ct. Rep. 360. See NOTES.

**PARTNERSHIP — PARTNERSHIP PROPERTY — EXEMPTIONS.**—The plaintiff, an individual creditor of the defendant, recovered judgment against him and levy was made on the debtor's undivided interest in certain partnership property consisting of four mules. The partnership was dissolved, and two of the mules surrendered to the de-

defendant. In an action to enforce a lien on them, *held*, that the defendant is protected by a statute providing that two work-beasts of an individual are exempt from execution. *Southern Jellico Coal Co. v. Smith*, 49 S. W. Rep. (Ky.).

It is held in Kentucky that a partner cannot claim exemptions out of partnership property against a partnership creditor. *Green v. Taylor*, 98 Ky. 330. This case presents the question of whether a partner can claim exemptions out of partnership property as against his individual creditor. When such a creditor has an execution levied on the debtor's interest in the firm assets, he secures the right to go into equity and force a settlement of the partnership. *Nixon v. Nash*, 12 Ohio, 647. His execution creates a lien on the property, subject to its liability as partnership property. *Pierce v. Jackson*, 6 Mass. 242. But the moment the partnership is settled and it is ascertained that some part of the property belongs to the debtor, his right to exemption is fixed and superior to the claim of the execution creditor. Such is the effect of the principal case, and it is doubtless correct. It is interesting to notice that under the peculiar circumstances here presented a like result would have been reached had the courts proceeded on the entity theory.

PATENTS — NOVELTY — EVIDENCE. — In an infringement suit evidence of immediate commercial success was introduced to support the patent. *Held*, that until invention is shown such evidence cannot be considered. *Way v. McClarin*, 91 Fed. Rep. 663 (Cir. Ct., Pa.).

The principal question presented is left in doubt by the authorities. Novelty is the primal requisite of invention and immediate commercial recognition has, indeed, a certain probative force on the question of novelty. Until recently the United States Supreme Court spoke of such recognition as "most pregnant evidence of novelty." *Magowan v. New York Belting Co.*, 141 U. S. 332. But later decisions of that court have tended toward the narrower view expressed in the principal case. *Duer v. Corbin Lock Co.*, 149 U. S. 216. It is clear that the true criterion of invention is intrinsic — the introduction of a new mechanical combination or principle. *Hotchkiss v. Greenwood*, 4 McLean, 456. Therefore, articles of commerce are not patentable merely because they are new. *Union Paper Collar Co. v. Van Dusen*, 23 Wall. 550. Moreover, commercial success is as apt to be due to extensive advertising and energetic selling as to novelty in invention. For these reasons the decision in the principal case, that such evidence is never to be considered unless the case is one of doubt, seems most politic.

PERSONS — MARRIED WOMEN — ALIENATING HUSBAND'S AFFECTIONS. — *Held*, that a married woman cannot maintain an action against a third person for alienating her husband's affections. *Morgan v. Martin*, 42 Atl. Rep. 354 (Me.). See NOTES.

PROPERTY — ADVERSE POSSESSION — TACKING. — *Held*, that a landowner is deprived of his title if the combined periods of occupancy of his disseisor and of the vendee of his disseisor equal twenty years. *Frost v. Courtis*, 52 N. E. Rep. 515 (Mass.). See NOTES.

PROPERTY — EASEMENTS — PAROL LICENSE. — The plaintiff had laid a water main across the defendant's lands under a parol license and had maintained it for more than six years. *Held*, that the plaintiff is not entitled to an injunction restraining the defendant from taking up the pipes. *Great Falls Waterworks Co. v. Great Northern Ry. Co.*, 54 Pac. Rep. 963 (Mont.). See NOTES.

PROPERTY — PLEDGE — CONVERSION. — The plaintiff deposited certificates of stock with the defendant as security for a debt. On default, the defendant sold the stock without notice to the plaintiff, who brings trover without tender of payment. *Held*, that the plaintiff can recover. *Feige v. Burt*, 77 N. W. Rep. 928 (Mich.). See NOTES.

PROPERTY — REVOCATION OF LICENSE — EQUITABLE REMEDY. — The plaintiff partially constructed a logging railroad over the defendant's land under a license, written but not sealed. The defendant having revoked the license, *held*, that equity will not enjoin him from interfering with the plaintiff's work since no incorporeal interest in land can be created without a deed. *Nowlin Lumber Co. v. Wilson*, 78 N. W. Rep. 338 Mich.

The authorities on this point are about equally divided, many cases being in accord with both the reasoning and the result reached in the above decision. *Owen v. Field*, 94 Mass. 457; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384. An opposing line of cases proceeds upon the principle that the licensor, in equity, should not be allowed to exercise his legal right to revoke, where the licensee has expended money on the land, so that a revocation would work a material fraud upon him. *Clark v. Glidden*, 60 Vt. 702; *Campbell v. Indianapolis, &c. Ry.*, 110 Ind. 490. The latter view avoids the difficulty stated in the principal case, as it does not involve the creation of any interest in land by virtue of the license, and the result thus reached seems preferable on general grounds of justice and equity.



**RIGHTS IN A DEAD BODY.** — The widow of a decedent was in possession of his body. *Held*, that a Court of Probate improperly awarded the custody to a stranger for the purpose of burial. *O'Donnell v. Slack*, 55 Pac. Rep. 906 (Cal. Sup. Ct.).

The result reached is doubtless correct, the right of the family to a decedent's body being recognized everywhere in this country. There is, however, some uncertainty as to the nature of that right. In the principal case the court is inclined to view it as a quasi-property right. *Pierce v. Proprietors of, etc. Cemetery*, 10 R. I. 227. It has been suggested that it would be more appropriate to classify it with those rights which rise out of the family relation, such as the right of a husband to the *consortium* of his wife. 5 HAR. LAW REV. 285. This explanation avoids many difficulties which arise in treating this subject as a branch of the law of property and is quite consistent with the results reached in the cases. *Larson v. Chase*, 47 Minn. 307. It also finds support in the disposition of the courts to award the disposal of the body of a married person to the husband or wife rather than to the next of kin. *Hackett v. Hackett*, 18 R. I. 155. See 10 HAR. LAW REV. 51.

**SURETYSHIP — EXTENSION OF TIME — DISCHARGE OF SURETIES.** — The obligee of a bond agreed to extend the time of payment for a fixed period, the obligor promising to pay the debt and interest at the expiration of that time and not before. *Held*, that the agreement was invalid for want of consideration and did not discharge the sureties. *Olmstead v. Latimer*, 53 N. E. Rep. 5 (N. Y.).

It is difficult to uphold this decision, although it has the support of some cases in other jurisdictions. *Abel v. Alexander*, 45 Ind. 523; *Hule v. Forbis*, 3 Mont. 395. Even if one adopts the theory that to make the promise of the obligee binding the promise of the obligor must be to do something which will work a legal detriment to the latter, there is a good consideration here. The giving up by the obligor of the right to pay his debt at any time before the expiration of the period of extension is the surrender of a valuable legal right, and a sufficient consideration for the undertaking of the obligee. *Ostrander v. Everest*, 44 Minn. 419. Further, by such agreement the debtor postpones the running of the statute of limitations against his obligation, and this in itself is enough to support the creditor's promise. See *Gurgett v. Brock*, 27 Ga. 576. The agreement in the principal case, therefore, it seems, was valid and the sureties should have been discharged.

**TORTS — DECEIT — REPRESENTATIONS OF VALUE.** — The defendants induced the plaintiff to purchase an interest in a patent on harness buckles by false statements in regard to the cost of manufacturing the buckles. *Held*, that an action for deceit lies. *Braley v. Powers*, 42 Atl. Rep. 362 (Me.).

The better view seems to be that false statements by the vendor as to the cost of an article may be actionable. *Fairchild v. McMahon*, 139 N. Y. 290; *Weeks v. Burton*, 7 Vt. 67. Some courts, however, hold that such statements are to be regarded as mere "seller's talk," and will not support an action unless the vendor is in a position to have special knowledge of the subject. *Bourn v. Davis*, 76 Me. 223; *Mooney v. Miller*, 102 Mass. 217; *Stover v. Wood*, 26 N. J. Eq. 417. According to either view the principal case is correctly decided. Statements by the patentee as to the cost of manufacturing the article do not properly come under the head of "seller's talk." In such a case the vendor clearly has special knowledge on which the vendee is entitled to rely.

**TORTS — INTERFERENCE WITH BUSINESS — CONSPIRACY.** — A granite manufacturers' association adopted a resolution forbidding trading in granite except with members of the association. The by-laws imposed a fine for a violation of the rules, and the effect was practically to destroy the plaintiff's business. *Held*, that the members of the association are liable to the plaintiff, although they made no attempt to influence persons outside of the association. *Boutwell v. Marr*, 42 Atl. Rep. 607 (Vt.).

The case is unsatisfactory because no authority is cited, but interesting from the fact that the only coercion was that exercised on the members of the association by the fine. In this the court found "unlawful means." It seems clear the English courts would not allow recovery in such a case as this. *Allen v. Flood*, [1898] App. Cas. 1; *Huttley v. Simmons*, 14 Times L. R. 150; *Mogul Steamship Co. v. McGregor*, 15 Q. B. D. 476. There are also American cases *contra*. *Macaulay v. Tierney*, 19 R. I. 255; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223. The principal case is an extreme example of the length to which some American courts go in allowing recovery in these cases. *Barr v. Essex Trade Council*, 53 N. J. Eq. 101. On the facts as stated, it seems an unjustifiable attempt to furnish a legal remedy for the hardships of competition by combination, and is hardly to be supported either on legal theory or on the ground of public policy.

**TRUSTS — GRATUITOUS DECLARATION — REVOCATION.** — The deceased had her bank-book made out to her in trust for X. Later she surrendered the book to the bank, and took a new one in trust for Y. Both trusts were gratuitous. *Held*, that the trust in favor of X was revoked, and Y is entitled to take as *cuius que trust*. *Jennings v. Hennessy*, 55 N. Y. Supp. 833 (Sup. Ct., Trial Term, N. Y. Co.).

The facts in the case do not show clearly whether an enforceable trust in favor of X was established. A trust can certainly be created by a gratuitous declaration similar to the one in the present case, and when once created is irrevocable. *Martin v. Funk*, 75 N. Y. 134; *Fellow's Appeal*, 93 Pa. St. 470. If, however, the declaration of trust was merely for the purpose of evading some by-law of the bank and no trust was actually intended, equity will not enforce it, and will permit a revocation. *Brabrook v. Boston Bank*, 104 Mass. 228; *Markey v. Markey*, 73 N. Y. Supp. 925. Extrinsic evidence is admissible in such cases to explain the true character of the transaction. *Cunningham v. Davenport*, 147 N. Y. 43. No evidence appears to have been offered in explanation in the present case, however, and, from the meagre facts given, it appears that an irrevocable trust had been established, and that the first *cestui que trust*, X, having the prior equity, should have been allowed to recover.

## REVIEWS.

THE JURISDICTION OF FEDERAL COURTS AS LIMITED BY THE CITIZENSHIP AND RESIDENCE OF THE PARTIES. By Howard M. Carter of the Chicago Bar. Boston: Little, Brown & Co. 1899. pp. xxviii, 303.

The plan of making a book on a narrow subject, one which usually forms a chapter or two of a book, instead of a whole book, has much to commend it. A thoroughness and care of treatment is possible, which is hardly attainable in a large field; and the book before us contains certainly the most complete and useful discussion in print on the topic with which it deals. Nevertheless, it is not so good a book as it should be. It seems unduly expanded in the way of quotations for nearly, if not quite, 100 of the 247 pages which constitute the body of the work are made up of such material; yet in spite of this elaboration the real defect is lack of thoroughness. It is not too much to ask of the author of a book covering so small a field, in which, moreover, all the authorities are contained in the reports of the Federal Courts, that his work shall be absolutely exhaustive, not simply in the treatment of principles, but in the citation of cases. Mr. Carter's work does not come up to this standard. Not only are the citations from the Federal Reporter not exhaustive, but important recent decisions of the Supreme Court are omitted. *Barrows v. S. S. Co. v. Kane*, 170 U. S. 100, on the right to sue an alien in any District, *St. Joseph & G. I. R. R. Co. v. Steele*, 167 U. S. 659, in regard to the citizenship of a corporation chartered by several states, *Mexican Nat. R. R. Co. v. Davidson*, 157 U. S. 201, on what is a chose in action within the meaning of the statutes governing the jurisdiction of the United States courts, are each the latest decision on an important point dealt with by this book, yet not one of these cases is cited. On page 169 there is something more than an error of omission. It is stated that the appointment by a foreign corporation in compliance with a statute of an agent authorized to receive service of process is not a waiver of its right to insist on being sued in the State of its incorporation. For this statement a case of half a page in the Federal Reporter is cited. But the contrary has been decided in other Circuits in at least three cases not cited either in that case or by Mr. Carter. *Consolidated Store Service Co. v. Lamson Consolidated Store Service Co.*, 41 Fed. Rep. 833; *Gilbert v. New Zealand Ins. Co.*, 49 Fed. Rep. 884; *Youmans v. Minn. Title Ins. & Trust Co.*, 67 Fed. Rep. 282. It seems very possible that a difference in the wording of different statutes might cause the same judge to make varying decisions as to whether such an appointment operated as a waiver.

S. W.



AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY. With Original Authorities. By Kenelm Edward Digby, M. A., assisted by William Montagu Harrison, M. A. Fifth Edition. Oxford: At the Clarendon Press. London: Henry Frowde. 1897. pp. xiv. 448.

A new edition of a work so well known as Digby's History of the Law of Real Property might be dismissed without extended comment. Especially is this so in the present instance, as the changes from the last edition are practically limited to revision in the light of Pollock and Maitland's History of English Law. But the book is such a good one, that even under these circumstances some space may perhaps be justifiably devoted to it.

Mr. Digby is one of those who find the source of the English manorial system in the Teutonic village community rather than in any Roman prototype. To an account of the growth of this system from its beginnings under the Anglo-Saxons to its final development after the conquest he devotes the early part of his book. Though his method of incorporating copious extracts from Glanvill and Bracton in his text, to such an extent as to make his own work at times extremely fragmentary, renders this portion of the book less readable than might be desired, yet it is needless to say that it contains much that is of interest to the unlearned. One may read here of the origin of dower in the marriage gift of land or chattels from the husband to his wife; of the change by which the interest of a lessee for years grew from a mere contract right against the lessor to a property right against the world, and still did not lose its original character as part of the personal estate; of the early conception of servitudes as so far partaking of the nature of freehold rights that the appropriate remedy for their disturbance was the assize of novel disseisin; of the distinction between the notion of a remainder, peculiar to English law, and the "substitution" of some of the systems based on the civil law.

Perhaps the most satisfactory part of the book is that which deals with the origin of uses and the effect of the Statute. The curiously scholastic spirit in which the latter was construed, and the realistic conception of a use which led to the doctrine of the non-applicability of the statute to a "use on a use" are interestingly treated. "The curious point is that these effects of the Statute of Uses are the result, not of consideration of public policy influencing either the legislature or the tribunals, but of the supposed logical consequences of the metaphysical conception of a use." p. 371, note.

The author occasionally asserts views the soundness of which, in the light of recent criticism, may certainly be questioned. For example, he speaks (p. 364) of the so-called rule that an estate cannot be limited to the unborn son of an unborn person as something entirely distinct from the rule against perpetuities. And on page 361 he says that if a limitation could be regarded as a remainder, it became settled law that it could not be regarded as a springing or a shifting use, even though void as a remainder. Mr. Gray, in his book on Perpetuities, has pointed out that the application under such circumstances of the doctrine that future limitations should be construed as remainders wherever possible, not only seemed "the very wantonness of destruction," but was not required by the authorities.

But, on the whole, Mr. Digby's work is careful and scholarly, and nowhere else can one find so much learning on the history of our land law compressed into so small a space.

R. G. D.

A TREATISE ON THE LAW OF CONTRACT OF PLEDGE. As governed by both the Common Law and the Civil Law. By Henry Denis. New Orleans: F. F. Hansell & Bro., Ltd. 1898. pp. xxxi, 619.

This book is not in any way an attempt to write a comprehensive text-book on the law of pledge, — it aims simply at an examination of the present state of the common law on the subject in comparison with the civil law from which it is largely derived, and with the later forms of the civil law, — particularly the Louisiana Code. In the civil law pledges are a definite branch of the law clearly understood and worked out; in the common law on the other hand the subject is constantly confused with the general topic of bailments and with mortgages of chattels. And a comparison of the two systems is the more valuable and necessary, because the civil law has been so often half understood and misunderstood by the common law commentators, — notably by Story.

To set right these errors, to give a clear analytical comparison of the two systems, — so much this book has aimed at and accomplished. The differences are noted, the relative advantages commented upon, the diverging tendencies clearly pointed out. The whole method of the book is scientific, the work careful and systematic, the style admirably terse and straightforward, and if didactic, at least convincing. It is to be regretted that the citation of cases are so infrequent, and the references to the common law commentators so many, and again that the author has seen fit to place so little emphasis on tracing the growth of the law regarding pledges in the two systems.

This summary treatment and lack of attention to recent cases has led, in at least one instance, to actual error, p. 206, where it is stated as established American law, that the pledgee may repledge without consent of the pledgor, — the question is still an open one in many jurisdictions. Yet on the whole the book cannot fail to lead to a clearer understanding of the common law in regard to pledges.

J. P. C., JR.

## BOOKS RECEIVED.

[Entry under this head does not preclude further notice of a book in this or in a later number of the Review.]

A TREATISE ON THE LAW OF THE CONTRACT OF PLEDGE. By Henry Denis. New Orleans: F. F. Hansell & Bro. 1898.

REPORT OF THE TWENTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Philadelphia: Dando Printing and Publishing Co. 1898.

THE FEDERAL COURTS. By Charles V. Simonton. 2d edition. Richmond, Va. B. F. Johnson Publishing Co. 1898.

THE JURISDICTION OF THE FEDERAL COURTS. By Howard M. Carter. Boston: Little, Brown & Co. 1899.

THE LAW OF PARTNERSHIP. By Francis M. Burdick. Boston: Little, Brown & Co. 1899.



# HARVARD LAW REVIEW.

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VOL. XIII.

JUNE, 1899.

No. 2.

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## WILL THE FORM OF PARLIAMENTARY GOVERNMENT BE PERMANENT?

THE prevalent faith in the permanence of Parliamentary government rests on two facts of most unequal significance.

Of these the first, and by far the most important, is the endurance and the success of the English constitution.

The English Parliament has existed more or less under its present form for more than six centuries, and as one generation has succeeded another generation the power of two Houses, and especially of the House of Commons, has increased until at last they have become the center of our public life.

The impressiveness of this fact is increased by the knowledge that the position, the influence, and the character of the English Parliament has varied from age to age. For this variation establishes the capacity inherent in representative government for adapting itself to the changing circumstances of different eras. This is just one of those phenomena which impress the imagination. The constitution, which in a certain sense took its present form under Edward I., has been found to suit times as different from the age of the Plantagenets as from our own, and step by step, as the power of England has increased, so the constitution has proved itself capable of expansion. The constitution has been flexible enough to admit of the incorporation of Wales with England, the union of England and Scotland, and the union of Great Britain

with Ireland. A system, moreover, framed originally for the government of part of a small island, has by a course of almost unconscious adjustment developed so as to meet the wants of a large empire, and the body which was originally the Parliament merely of England, has come to control in different manners and in different degrees colonies and dependencies whereof some, such as Victoria or the Canadian Dominion, have attained to virtual independence, and others, such as the whole Indian Empire, are in truth governed by officials who in the last resort take their orders from a Parliamentary committee. Nor can the severest censor deny that English constitutionalism has, if judged by its fruits, been crowned with extraordinary success. Parliament, no doubt, has committed the grossest errors, but the same thing may be said of every government which has ever existed; the smallness of the wisdom which is employed upon and suffices for the ruling of the world has become proverbial. In the United States, at any rate, is it at all likely that the incapacity and want of foresight displayed in colonial affairs by George the Third and his people will be underrated,—though it may still remain a question to be solved only by the history of the future whether the folly and incompetence of Presidents may not in the long run prove as disastrous as the ignorance and arrogance of Kings? But when the blunders of Parliament are weighed against the achievements of the English people, candid critics will own that a large balance stands to the credit of constitutional government. For England under, if not by virtue of, her constitution has in every age come safely through storms in which other nations have made shipwreck. The constitution, in which must be included our whole judicial system, kept alive the traditions of freedom throughout the anarchy of the War of the Roses and prevented the turbulence of aristocratic factions from destroying the vitality of the people. National prosperity under the Tudors was due, it may be asserted, to the crown rather than to the two houses. But this assertion, even if its truth be granted, does not substantially detract from the services rendered to the country by representative institutions. For the existence of Parliament either checked the tyranny of the crown, or directed despotic power into channels in which its exercise, while it increased the authority of the King, favoured the welfare of the nation. Under the Parliamentary system of England the country went with success through the social and ecclesiastical revolution which we call the reformation, and suffered not one tithe of the miseries



which crushed the hope of establishing religious freedom in France and deferred for generations the unity and the prosperity of Germany. That the constitution enabled the nation to resist the despotism of the Stuarts and ultimately to establish the reign of religious toleration is patent to every student. A matter which is less observed, and therefore deserves more attention, is that English constitutionalism restored the public morality which had been shaken by the revolutionary movements of the seventeenth century. Compare the age of Walpole with the age of Peel. Mark the gradual revival of high public spirit which had taken place during the intervening period. From such a comparison it is impossible not to conclude that, whatever the defects of the unreformed Parliament, there was something to be found in the institutions of England which not only allowed but encouraged an improvement in the general character of public life. Parliamentary constitutionalism, lastly, carried the country triumphantly through the conflict with Jacobinical and Imperial France, and during the long peace which ensued procured for England without the evils of revolution all the beneficial reforms which on the Continent have been attained (if at all) at the cost of violence and injustice. No one, then, can wonder that the combined stability and flexibility of English institutions should have made a lasting impression on the imagination of the modern world.

The second great fact on which rests the faith in representative government is the extension of the Parliamentary system throughout the whole of the civilized world.

This system of government has now been adopted by all the states of Europe except Russia and Turkey; it prevails, speaking broadly, in every country which has drawn its civilization from European sources; it has at last invaded even the far East. The extraordinary, not to say excessive, imitativeness of the Japanese has enabled them to create, as it were at one stroke, a copy or a caricature of modern constitutionalism. They have their constitutional King, their Cabinets, their Ministerial majorities, their Opposition, and their Obstructives, and have reproduced the flaws as accurately as the beauties of popular government in its latest shape. Whether this importation of the political wares of Europe into an Eastern country will turn out for the benefit of Japan, time alone can show; but the adoption of the forms of constitutionalism by an Eastern race utterly devoid of Parliamentary traditions is conclusive evidence that to the men of to-day representative government

appears to be an essential characteristic of a civilized or progressive state.

This state of opinion is perfectly natural, yet there exist considerations which may suggest a doubt whether its soundness is established by the facts on which it admittedly rests.

The constitutional history of England, in the first place, is exceptional, not to say anomalous, and any careful reasoner must be on his guard against applying to the inhabitants of other lands lessons drawn from the experience of Englishmen. One example among a score which lie ready to hand is enough to illustrate my meaning. The insular character of the country has saved the liberties of England from destruction. It is difficult to see how they could possibly have struck deep root or been gradually extended on the European continent, or indeed in any country exposed to the attacks of powerful neighbors and hence compelled to strengthen the authority of the executive and ultimately to keep on foot a large standing army. At the present moment it is hard to realize how insignificant were the armed forces of England during the period when Parliament laid the foundations of its authority. At one crisis, indeed, the protection of English freedom necessitated the creation of a standing army and submission to the unlimited power of a successful general. This attempt to use military force on behalf of Parliamentary freedom was made under the most favourable circumstances; Cromwell was by training a civilian, his soldiers were republicans. But the experiment ended in failure. Supremacy of the army was found incompatible with respect for the liberties of Englishmen, and the Restoration was even more the victory of the Parliament than of the crown. The United Kingdom now maintains armed forces which a past generation would have considered, and not without reason, a menace to civil liberty. But British armies now exist for the protection of the whole British Empire, and for this purpose they are not large, and a navy is a force which, except in the rarest cases, cannot be used as the means for effecting revolution. Parliament, moreover,—and this is, after all, the main point,—has now become an essential part of English institutions and the whole English people have been thoroughly imbued with Parliamentary ideas and Parliamentary traditions. The most vigilant friends of freedom therefore are assured that they may now witness with indifference the creation of armies far more numerous than the regiments which under Cromwell defied and dissolved Parliaments. There is no



need to illustrate my point further. It is clear that both the annals of England and the experience of other countries during the last hundred years make it in the highest degree doubtful how far English institutions can with success be transplanted to countries of which the development has been utterly different from the exceptional history of England; it assuredly were rash to assume that English experience proves Parliamentary government to be a form of polity adapted to the wants of every civilized people.

This proof is, it is supposed, afforded by our second great fact, namely, the expansion of Parliamentary government throughout the world.

Any thinker, however, who has learnt how immense is the influence in human affairs of imitativeness will hesitate to conclude that the rapid growth of a fashion proves its fitness to meet a given want. In politics fashion is omnipotent. Parliamentary government has during the last half century become fashionable, and the nations who one after another have adopted representative institutions have acted from the natural desire to imitate neighbours whose prosperity or power they admired. Japanese statesmen have perceived that Europe is strong. They wish to be like Europeans; they have adopted the political dress which is fashionable in Europe, just as they have many of them put on tail coats and tall hats. In each case they have wished to look like Europeans. They have acted exactly as did the Franks or the Lombards when they adopted the titles or the laws existing in the Roman Empire. If the desire to acquire Western habits had prevailed in Japan at the time when Louis the Fourteenth was the most admired of European potentates, Japanese statesmen would have organized an administration modelled on the administrative system of France; they would have followed the fashion of Paris rather than of London. The sequacity of human nature is not after all peculiar to any one race or country. The statesmen of modern Spain, Italy, or Mexico have under different forms followed the prevalent fashion of their day. Whether the constitution of a country should be a Parliamentary Monarchy, a Centralized Republic, or a Federal Commonwealth has in many cases been determined not by any rational conviction that a particular kind of government was adapted to meet the wants of a given people, but by the unconscious desire of constitution makers to follow the reigning fashion of their day, which in its turn depended upon the predominant prestige of England or of France, or of the United States.

A political invention, however, it may be said, — and Parliamentary government is nothing else than a more or less recently invented piece of political mechanism, — is like other products of human ingenuity, such, for example, as the steam-engine or the electric telegraph, adopted in one country or another in part at least because of its proved utility. The wide diffusion, therefore, of parliamentary institutions affords a presumption of their being found of advantage by the nations who adopt them.

This remark is obviously true; its force, however, is diminished by two reflections. The political fashion, in the first place, in which we are concerned is, historically speaking, of recent origin. In 1788 — The year before that meeting of the French States-General which opened the revolutionary drama — Parliamentary institutions were, broadly speaking, the exclusive possession of the English people. They existed only in England or in countries which were or had been colonies or dependencies of England. In Denmark and in Sweden, indeed, Parliaments had at dates which were then still recent been powerful, but in these countries they had been, or were about to be, abolished, and in each case the triumph of the crown was due to the favour of the people. There has, in the second place, been nothing more remarkable than the constant fluctuations of popular sentiment in regard to the advantages of Parliamentary constitutionalism. The French Revolution was a movement directed against social inequality and political despotism and naturally kindled enthusiasm for the best known and most successful form of popular government. At one moment therefore it seemed reasonable to anticipate that the Parliamentary system might be established in the leading states of Europe. This expectation was disappointed. Napoleon invented a new form of enlightened despotism more opposed to that freedom of discussion which is the very soul of Parliamentary government than were the monarchies which were destroyed or shaken by the Revolution. His fall brought English constitutionalism into vogue, but neither the overthrow of Napoleonic Imperialism nor the triumph of England did as much as might have been expected to propagate the faith in Parliamentary freedom. Consider the state of Europe in 1845. In several important countries, as for example, in France, in Belgium, and in the Spanish Peninsula, were to be found constitutional monarchies which reproduced at any rate the onward forms of English freedom. In some of these countries the reproduction was far more nominal than real. Still, in 1845 the realm



of liberty, as that term is understood in England, has been extended, but against this gain must be set the supremacy of despotism in Italy and practically throughout the whole of the Austrian Empire. Turn now to the year 1858. We shall find that the revolutions of 1848, though most of them futile, had in one or two countries, notably in Piedmont and in Switzerland, established a permanent form of Parliamentary government. But progress had been balanced by retrogression. In France the Empire had been re-established, and however odious the treachery of the *coup d'état*, re-established with the acquiescence if not with the active approbation of the French nation. But the Empire, whatever its other characteristics, was, and always will be, the negation of Parliamentary government. Throughout the Austrian dominion the rule of despotism had been strengthened and the constitutional rights of Hungary had been destroyed. The date of 1858 is worth notice; it marks the end of an age. In 1859 the war which partially liberated Italy opened something like a new era. Since that year Parliaments have been reintroduced or re-established in almost every European state. Still this fact, important though it be, does not entitle us to disregard the changes of public opinion in regard to Parliamentary government. They prove the possibility, at any rate, that a nation which, in accordance with the fashion of the day, has adopted, may, as the fashion alters, surrender a Parliamentary system of government; it cannot claim to stand on the same level as any invention which has so manifestly benefited mankind that it will not, or rather cannot, be given up by those who have once experienced its advantages.

The belief, then, in the permanence of the Parliamentary form of government rests, after all, on a narrow and uncertain basis of historical fact; it is founded, as we have seen, first, on the admitted success of the British constitution, and next, on the experience of something between fifty and a hundred years.

Against the force of these two facts is to be placed a phenomenon of which, whatever its permanent importance, no candid observer can deny the existence.

Faith in Parliaments has undergone an eclipse; in proportion as the area of representative government has extended, so the moral authority and prestige of representative government has diminished.

That this is so must be patent to any man old enough to remember the condition of opinion as late even as the middle of this century. When the revolutions of 1848 gave to reformers

or revolutionists an unexpected though transient opportunity for putting their theories into action, there arose in one European country after another the demand for a "constitution," a word which in those days invariably included the introduction, or the extension, of Parliamentary government. The truth is that at that date there was not a friend of the progress of freedom throughout Europe who did not believe that the extension of representative institutions of one kind or another throughout the civilized world would confer the greatest benefit on mankind. On this matter, and perhaps on this matter alone, English statesmen, such as Macaulay, Palmerston, or Gladstone, agreed not only with continental Parliamentarians, such as Cavour, but also with revolutionists of the most different types, such, for instance, as Lamartine, Kossuth, or Mazzini. Compare now this universal faith which marked the middle with the skepticism which marks the close of the nineteenth century. From every part of the world is heard criticism or censure of Parliamentary institutions. They may all be summed up in the one word, "Parliamentarism." It is an un-English term, though it can now make good its claim to the wide, if not indiscriminate hospitality extended by Dr. Murray's dictionary to any word, however uncouth, which has been used by any scribbler who purports to write the English language. It is of continental origin and expresses an idea which has till recently been foreign and almost unnatural to Englishmen, namely, the moral breakdown of Parliamentary government.

It were easy to cite proofs of the discredit, though it may well be only temporary discredit, into which Parliamentary constitutionalism has fallen. The increasing rigidity and minuteness of American constitutions, the Referendum of Switzerland,—which, by the way, exists in reality though not in name, in all but every State of the American Republic,—the proposals for elaborate schemes of proportional representation, the denunciation of the party system by brilliant and weighty writers who express in language which few men can command sentiments which thousands of men entertain, all bear witness to the widespread distrust of representative systems under which it, occasionally at least, may happen that an elected Parliament represents only the worst side of a great nation. But it is needless to produce evidence of a state of opinion of which few observers will deny the existence. For my present purpose the important matter is to define its causes.



These causes may be summed up under three or several different heads.

*First.* The general adoption of representative government has of necessity robbed Parliaments of much of their prestige.

As long as the countries which possessed representative legislatures were few and, as it happened, prosperous, it was easy to attribute their well-being to their admirable constitutions and to believe that any people would prosper who acquired the right to be their own lawgivers. It was easy also for every enthusiast to believe that a Parliament which represented the people would enact every law by which the people would benefit, or in other words every law which the reformer or philanthropist himself thought beneficial. These pleasing anticipations which at revolutionary crises have unduly influenced the judgment even of wise and experienced men were doomed to disappointment. Now that every country has its Parliament and countries still differ greatly in prosperity, we know for certain that representative institutions cannot insure national good fortune. Parliamentary legislatures, again, represent the folly no less than the wisdom of their electors and their legislation is often simply a record of human stupidity. A law, moreover, which is approved by one reformer is opposed to the firmest convictions of another; there never has been and never will be a law-giving body, be it King, Parliament, or popular assembly, the laws whereof do not offend at least as many persons as they conciliate.

*Secondly.* Some of the blessings which persons who could not be called optimists reasonably expected from the extension of popular government have not in fact been conferred upon the nations which of modern times have enjoyed representative institutions.

Take as an example of this the case of Italy. Not much more than forty years have passed since the best and wisest men throughout every country in Europe hailed with delight and hope the new birth of the Italian people. Every one had noted that under the most unfavourable circumstances Italy, though torn in pieces by foreigners and held in intellectual darkness by priestly tyranny and persecution, could still produce men of high genius and undoubted patriotism. The expulsion of foreigners and the introduction of civil and religious liberty would, it was confidently supposed, give new life to Italy, and enable her to form citizens who might in heart and intellect be the guides of modern Europe. Italy has now become as free as any country in the world; she is ruled, and

has been wholly ruled for more than twenty-five years, by a freely elected Parliament, convened by a constitutional monarch who has been absolutely loyal to the constitution, yet the hopes of the friends of Italy have been disappointed. They have been doomed to witness an historical paradox. The rule of the foreigner, of the despot, and of the priest gave birth to Italians whose names history will not easily forget; Italian freedom and independence have produced, as far as the outer world can see, nothing but politicians who for the most part may be happy to reflect that the insignificance which deprives them of contemporary fame may protect them from posthumous infamy. Where are the successors of Cavour, of Mazzini, of Garibaldi, or of Manin? Assuredly they are not to be found on the seats of the Parliament at Rome. No sane man, let me add, can wish for the restoration of despotism or doubt that Italy contains, as she always has contained, men of genius and greatness. But there are many observers at this moment who, unreasonably enough it may be, doubt whether Parliamentary constitutionalism of the modern type is likely to bring what is best and noblest in Italy to the service of a country which certainly needs the guidance of leaders endowed with wisdom and honesty. Add to this that Italy is not the only country in which representative government has of recent years failed to foster the best fruits of freedom.

*Thirdly.* The circumstances of modern life divest representative assemblies of dignity.

Publicity is a necessity, but it is also the bane of public life. It were easier for Englishmen to admire the House of Commons, and I conjecture for American citizens to admire the House of Representatives, were it not possible to read the daily records of Parliamentary or Congressional debates. There are certainly few works containing information of any worth whatever which in point of dreariness can rival the pages of Hansard. On the whole, the world has gained by the existence of a free press, and yet the instinctive hostility of the House of Commons to reporters was not in every way unreasonable. The newspapers inevitably display to the world the paltry and undignified side of Parliamentary government. There is no valid ground to suppose that the amount of talent to be found among English Members of Parliament at the end of the nineteenth century is less than can be discovered among their predecessors at the end of the eighteenth century. But there is one great difference. Every Member of Parliament, whatever his talents, is now more or less before the world. We all know the weak sides of our great



men, and what is perhaps even worse, the utter commonplaceness of our second-rate and third-rate politicians. At the end of the last century the few men who were known to the mass of the nation were leaders, and these leaders never came before the public in undress. Even fifty years ago, Lord Palmerston could jeer at Mr. Bright for "starring it in the provinces." The jest was even then a little out of date; it would now be unmeaning. To "star it in the provinces" has for the last twenty years or more been a main occupation of every public man from the premier downwards who was, or aspired to be, a leader.

*Fourthly.* Recent years have revealed the liability of Parliament to two weaknesses or diseases, the existence of which was not noted even by an observer so acute as Bagehot.

The first of these maladies is the tyranny of minorities. We now know that by means of obstruction a determined minority may thwart the will of a majority and undermine at once the authority and efficiency of a legislature. This disease, it is true, can, as we also know, be checked by its proper remedy, but the closure, which is as yet the only discovered safeguard against obstruction, is from the point of view of a Parliamentarian such as Bagehot, nearly as bad as the malady it cures. For the closure puts an end to that free debate which is essential to government by discussion, and the possibility of dispensing with discussion suggests at least the idea which is fatal to the moral authority of Parliament, that Parliamentary debate is in itself of no great value.

The second of these diseases is the failure of a Parliament fairly elected by fairly formed constituencies to represent, even on matters of importance, the wishes of the nation.

This is a risk against which you will find little or no warning in the pages of the older writers on the constitution, such as Hallam, Freeman or Bagehot. Yet the possibility of such failure has now become notorious. Whenever the citizens of an American State reject changes proposed by a constitutional convention, whenever the people of Switzerland on a Referendum veto laws passed by the Federal Assembly, whenever a newly elected English House of Commons condemns by a decisive majority a bill which has been passed by a House of Commons which has just been dissolved, it is patent that representative bodies have misrepresented the wishes of their electors. Let it too be noted that this failure on the part of a representative assembly to perform its main function need not arise from any treachery or misconduct on the part of its members.

The Swiss people have again and again re-elected to seats in Parliament the very men whose legislation the Swiss people have refused to sanction. On the merits or defects of direct legislation by the people it is for my present purpose unnecessary to pronounce any opinion whatever. All that is here insisted upon is that the possibility of a representative body failing to represent the persons who elected it detracts from the authority of a Parliament.

*Lastly.* Parliaments have suffered in credit because they have of recent years been set to do work for the performance of which an assembly is by its nature unfit.

This is assuredly true of the ancient Parliament of England. The aim of the reformers who at the end of the last and in the early part of the present century extolled the merits of representative government was in the main to destroy all the monopolies and privileges which hampered the exercise of individual freedom. Now for purposes of destruction a popular assembly is the best of instruments. The Long Parliament by two short ordinances abolished the English Monarchy and the House of Lords. The National Assembly of France in one night's sitting destroyed all the remnants of feudalism, and if "the St. Bartholomew of Abuses," as a French historian has named the 4th of August, 1789, did not in reality make as clean a sweep as the Assembly desired of the *ancien régime*, the partial failure was due to the impossibility of reforming the land laws of any country without constructive legislation which replaces the laws which you abolish by some new and better system. Nor is it revolutionary assemblies alone which are good at destruction. To repeal the penal laws which oppressed the Catholics, to do away with every form of Protection, to disestablish the Irish Church, were feats which lay well within the competence and were admirably performed by the Parliament of the United Kingdom. There is no reason to suppose that Parliamentary capacity for destruction is a whit lessened. If the demand of the age were still a demand for destructive legislation, the Parliament of England would prove as efficient as ever. A change, however, has gradually come over the spirit of our times. Modern reformers have, at any rate for the last quarter of a century, called for constructive legislation which it is supposed will meet the needs of the country and render happier the life of the masses. We have passed, or we have partially passed, and this almost unconsciously, from the creed of Individualism to the creed of Collectivism. This



new form of faith imposes upon a representative assembly the very work which a large representative assembly is not well fitted to perform. The declining belief in the doctrine of *laissez-faire* connects naturally with the fall in the credit and moral authority of Parliament.

If there be any truth in these reflections, we arrive at results which, though far removed from the field of practical politics, may have a certain speculative interest. The belief that the Parliamentary system, as it now exists, is likely to be permanent, is based, we find, on certain real and important facts, which, however, afford a narrow and insufficient foundation for the conclusion rested upon them. It becomes clear again, on the other hand, that during the latter part of the nineteenth century the prestige of Parliamentary government has declined. This loss of credit or moral authority is due (it is submitted) to definite causes of very varying importance. To what extent these causes are likely to continue in operation and how far they may be removed or counteracted, is one of those questions on which a prudent thinker will do well to pronounce no definite opinion, but leave it to the consideration of intelligent readers.

*A. V. Dicey.*

## DEPENDENCY OF MUTUAL PROMISES IN THE CIVIL LAW.

IN the early Roman law, as in the early English law, the promises in a bilateral agreement seem to have been regarded as independent of each other so far as performance was concerned. If the agreement was by stipulation, two stipulations were necessary, and there were formed two independent unilateral contracts. If the agreement was consensual, but could not be classed with the nominate contracts of sale, hiring, partnership, or agency, no obligation arose from it until one party had performed.<sup>1</sup> Such obligations, also, were therefore necessarily unilateral when they arose. So that the question is fairly presented in regard only to the nominate contracts just mentioned, which, however, came to include the great bulk of contractual dealings. The proof that in these contracts the promises were at first regarded as independent is contained in a passage from Varro's treatise, *De Re Rustica*, written about 36 B. C. After dealing with the delivery of herds which have been sold, the author continues, "And the buyer can obtain judgment against him in an action on the sale, if he does not deliver, although he himself has not paid the money, as in like manner the seller may against the buyer if the latter does not pay the price."<sup>2</sup>

The next certain historical evidence is contained in a passage from the *Institutes of Gaius*, which were published 161 A. D.

"Or suppose an auctioneer sues for the price of a thing he has sold by auction, and that the exception is taken that the defendant ought not to be condemned unless the thing he has purchased has been delivered to him, the exception is good; but if it was one of the conditions of sale that there should be no delivery until payment of the price, the auctioneer may have this replication: 'or if it was announced previous

<sup>1</sup> The law as to stipulations and innominate contracts remained fixed in the Roman law, as stated. — Windscheid, *Lehrbuch des Pandektenrechts*, II. § 321, note 9.

<sup>2</sup> *Quum id factum non est, tamen grex nominium non mutavit nisi est adnumeratum. Nec non emptor pote ex empto vendito illum damnare, si non tradet, quamvis non solverit nummos, ut ille emptorem simili iudicio sinon reddet pretium.* — Varro, *De Re Rustica*, II. 2, § 6.



to the sale that the thing would not be delivered to the purchaser until he had paid the price.'"<sup>1</sup>

There has been some conflict of opinion as to whether this passage was based on a special law aimed against auctioneers or whether the case of an auctioneer was taken merely as an illustration of a universal principle.<sup>2</sup> Assuming the latter view to be correct (and subsequent quotations will show that if the principle had not become general by the time of Gaius it soon became so), the passage indicates both that there was ground for an exception if the seller sought to recover the price without delivering the subject matter of the sale, and further that by special agreement as to the respective times of performance of the parties, such an exception could be met. Presumably in case of an action by the buyer, the seller would have been given relief on like principles.

There are several passages in the Digest and Code, throwing light on the topic. The jurists to whom the passages are attributed all flourished about 200 A. D., so that by that time the general theory at least of the mutual dependency of the obligations arising from one of the nominate consensual bilateral contracts must have been recognized. The most important passages are as follows:

"If, of the farms which you have bought, any have been mortgaged and have not been delivered, you shall have an action *ex emto* in order that they may be released from the creditor. Likewise, if the buyer sues for the price in an action *ex vendito* you will set up the exception of fraud."<sup>3</sup>

"If one who has bought a harvest of growing grapes is forbidden by the seller to gather them he can make use of this exception against the seller, if the latter sues for the price: 'if this money for which the suit is brought was promised for the harvest which has arrived at maturity and has not been delivered. . . .'"<sup>4</sup>

<sup>1</sup> Item si argentarius pretium rei quae in auctionem venierit persequatur, obicitur ei exceptio ut ita demum emptor damnetur si ei res quam emerit tradita est; et est justa exceptio: sed si in auctione praedictum est ne ante emptori traderetur quam si praetium solverit, replicatione tali argentarius adjuvatur: 'Aut si praedictum est ne aliter emptori res traderetur quam si praetium emptor solverit.' — Gaius, IV. 126 a.

<sup>2</sup> Dernburg, Pandekten, II. § 20, supports the former view; Bechmann, Der Kauf I. 570, the latter.

<sup>3</sup> C. 8. 44. 5. Ex praediis, quae mercata es, si aliqua a venditore obligata et necdum tradita sunt, ex emto actione consequeris, ut ea a creditore liberentur. Idem etiam fiet, si adversus venditorem, ex vendito actione praetium petentem, doli exceptionem opposueris. — Antoninus.

<sup>4</sup> D. 19. 1. 25. Qui pendentem vindemiam emit si uvam legere prohibeatur a venditore, adversus eum petentem pretium exceptione uti poterit 'si ea pecunia, qua de agitur, non pro ea re petitur, quae venit neque tradita est. . . .' — Julianus.

"... One may likewise defeat a suit for the price brought by one who has sold goods belonging to another by setting up the exception of goods not delivered, although he who assumed to sell them has already paid the price to the owner. He has in this case recourse against the owner. It is the same, according to Pedius, in the case of one who has sold goods while assuming to act in our affairs."<sup>1</sup>

"When the buyer brings an action against the seller, the price ought to be offered by the buyer, and although he offers a part of the price, not yet does he have an action against the seller; for the seller can retain the thing which he sold, as if it were a pledge."<sup>2</sup>

A few other passages<sup>3</sup> are referred to in this connection, but their bearing on the subject seems somewhat remote; and it must be admitted that the materials are too meagre to make it profitable to discuss in much detail the theories of Roman jurists on the reciprocal rights and duties in the performance of bilateral contracts of sale, hiring, partnership and agency.<sup>4</sup> It seems evident enough, however, that non-performance by the plaintiff of his promise in such a bilateral contract afforded generally a defence. The particular cases stated relate to sales exclusively, but the assumption made by the writers, that the principle was a general one and that sales furnished the readiest illustration, seems fair. It is a probable supposition too, that the defendant's defence was taken by exception, rather than by denial of any allegations expressed or implied in the plaintiff's pleading. That is, the plaintiff's performance was not strictly a condition precedent to his right of action, but his obligation to perform was the basis of a counter-right on the part of the defendant, and if this obligation was not fulfilled, it effected

<sup>1</sup> D. 44. 4. 5. § 4. The passage in full is: Si servus veniit ab eo, cui hoc dominus permisit, et redhibitus sit domino: agenti venditori de pretio exceptio opponitur redhibitionis, licet jam is qui vendidit dominum pretium solverit (etiam mercis non traditae exceptione summovetur et qui pecuniam domino jam solvit) et ideo is qui vendidit agit adversus dominum. Eandem causam esse Pedius ait eius, qui negotium nostrum gerens vendidit. — Paulus.

<sup>2</sup> D. 19. 1. 13. § 8. Offerri pretium ab emptore debet cum ex empto agitur, et ideo etsi pretii partem offerat, nondum est ex empto actio: venditor enim quasi pignus retinere potest eam rem quam vendidit. — Ulpianus.

<sup>3</sup> D. 18. 1. 34. § 3; D. 18. 4. 22; D. 18. 5. 7. § 1; D. 21. 1. 57; D. 21. 1. 59; C. 2. 3. 21.

<sup>4</sup> This has, of course been attempted by the German writers, but the results seem hardly adequate to the learning expended upon the problem. The best brief commentary on the passages quoted and others is contained in André, *Die Einrede des nicht erfüllten Vertrages* (Leipzig, 1890,) p. 30 et seq.



the destruction of the plaintiff's claim.<sup>1</sup> Whether there was a special exception recognized as *exceptio mercis non traditæ*,—the words used in the extract quoted above from Paulus—or whether it was regarded as a kind of *exceptio doli*, as might be inferred from the passage quoted from the Code, is not so clear; though both assumptions are often made.<sup>2</sup>

Besides the negative difficulty due to the slightness of the materials which the Corpus Juris affords, there is a positive difficulty in working out a complete theory. In a contract of sale the buyer was bound by the Roman law to pay the price though the subject matter of the sale were destroyed by accident before the transfer of title.<sup>3</sup> From this rule it might be supposed that the theory of the Roman jurists was that in order to make out an excuse for non-performance by one party to a bilateral contract, not merely failure but unexcused failure to perform by the other side was essential—that it was the wrongful breach of contract, not the mere non-receipt of what was promised, that afforded ground for an *exceptio*.<sup>4</sup> But this supposition does not square with the rule in regard to risk in contracts of leasing and hiring, whether of property or of personal services. In these cases non-performance, though excused by impossibility, was a defence to an action for the stipulated price.<sup>5</sup> There is here an inconsistency from which no amount of juridical learning has been able to effect an escape.<sup>6</sup>

<sup>1</sup> This proposition, though now generally admitted, was formerly much doubted in Germany and stress was laid on the words in the last passage cited from the Digest, "nondum est ex empto acto" as showing that performance by the plaintiff was a condition precedent to his right of action. But it was shown by Heerwart, *Archiv für die Civil. Praxis*, vii. 344, 345, that analogous expressions are used in many other places in the Digest where an exception was unquestionably necessary to protect the defendant. See also Dernburg, *Pandekten*, ii. § 20. note 4.

<sup>2</sup> The exception is classed by modern writers as a kind of *exceptio doli*, though frequently with recognition that the classification is not wholly fortunate. André, 122 *Larombière*, *Théorie des Obligations* (ed. 1885), III. 266; Giorgi, *Teoria delle obbligazioni* (4th ed.), IV. 207. See also an article on the *exceptio doli*, by Römer in *Zeitschrift für Handelsrecht*, XX. 48.

<sup>3</sup> Inst. of Justinian, lib. III. tit. XXIII. 3. The subject of risk of loss after a contract of sale in the Roman Law is discussed in 9 *HARVARD LAW REVIEW*, 72.

<sup>4</sup> And so the rule is often stated, e. g. by Pothier, *Contrat de Vente*, § 307; Dernburg, *Pandekten*, ii. § 20. The other view is well stated by André, 146 *et seq.*

<sup>5</sup> Dig. 19. 1, 50, Hunter, *Roman Law* (3d ed.), 508, 512.

<sup>6</sup> See Hofmann, *Periculum beim Kaufe* (Vienna, 1870) pp. 18–21. The rule in regard to risk of loss after a contract of sale is of great antiquity (see Hofmann, pp. 169–188), and perhaps the most satisfactory way of dealing with that rule is to regard it as a sur-

Connected with the right to refuse performance of a contract because the other party has not performed, is the right to have the contract rescinded or dissolved for that reason and any performance already given restored if the nature of the case allow. If no performance by either party has been made, and performance by the party in default no longer can be made, either because the proper time has elapsed or for any other reason, it makes little practical difference whether it is said that the other party has the right to rescind the contract or merely that he need not perform until he receives performance. The result is the same. But where performance has been partly rendered, or is still possible, the difference is important. The right to rescind the transaction does, it is true, imply the right to refuse to perform without receiving counter performance, but the converse statement does not hold good.

Roman law did not authorize dissolution of a sale because of non-payment of the price, and the same principle is applicable to the other consensual contracts under discussion.<sup>1</sup> If the seller trusted to the credit of the buyer he had no other remedy than a personal action for the price.<sup>2</sup> In order to give the seller the right of rescission if the buyer failed to fulfil his obligations it was necessary to insert a special clause which was called *lex commissoria*.<sup>3</sup> In later Roman law the buyer was allowed to rescind a sale without this special agreement in case the article sold had latent defects, but not simply because the seller had broken his contract.<sup>4</sup>

Modern civil law has developed and in some respects changed the doctrines of the Roman law.

In France it is well recognized that one party to a bilateral contract has the right to refuse performance until the other party has performed or offered to do so. This is called the right of retention, being considered analogous to the right of a pledgee.<sup>5</sup> The Code Civil expressly gives the right only in the case of sales and

vival in a particular class of cases of the early doctrine of the independence of mutual promises, indicated by the quotation from Varro, *supra*, in spite of the later development of a general doctrine of inconsistent nature.

<sup>1</sup> Windscheid, Lehrbuch, II. § 321, note 9.

<sup>2</sup> Actio, tibi pretii, non eorum quae dedisti repetitio competit. C. 4. 38. 8. See also C. 4. 44. 14.

<sup>3</sup> Larombière, III. 84; Moyle, Sale in Civil Law, 169; Hunter, Roman Law, 591.

<sup>4</sup> Larombière, III. 85; Moyle, Sale in Civil Law, 201; Hunter, Roman Law, 498-502.

<sup>5</sup> Saleilles, Annales de Droit Commercial, VII. 25; Larombière, III. 266.



in favor of the seller only,<sup>1</sup> but it is not questioned that it exists in all bilateral contracts.<sup>2</sup>

This right, however, has been very little considered in French law, and has never received elaborate treatment by French writers. The reason for this is not far to seek. The right of one party to a bargain to rescind it for non-performance or imperfect performance by the other party, — a right which as previously stated, did not generally exist in the Roman law, — had already by legal usage been greatly extended at the time when Pothier wrote,<sup>3</sup> and Article 1184 of the Code Napoléon made the principle universal. That article made it an implied condition subsequent in every bilateral contract that each party satisfy his obligation to the other. The provision is unchanged in the Code Civil at the present day.<sup>4</sup> It is true the right of retention gives a technically different remedy and one which might possibly be more desirable in a particular case.<sup>5</sup> But practically the remedy of specific performance or that of rescission with damages seems to have been found sufficient. As a general rule these remedies afford more effective redress for the injured party

<sup>1</sup> Art. 1612. Le vendeur n'est pas tenu de délivrer la chose, si l'acheteur n'en paie pas le prix, et que le vendeur ne lui ait pas accordé un délai pour le payement. See also Arts. 1651, 1653, 1749, 2102-2104.

<sup>2</sup> Larombière, III. 266; Saleilles, Ann. de Droit Comm. VII. 25. Indeed the language and illustrations of Larombière indicate that it exists in all reciprocal obligations, whether arising from contract or not.

<sup>3</sup> Contract de Vente § 475. This was published in 1762.

<sup>4</sup> Art. 1184. La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement.

Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a la choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts.

La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances.

In this connection too should be noted :

Art. 1610. Si le vendeur manque à faire la délivrance dans le temps convenu entre les parties, l'acquéreur pourra, à son choix, demander la résolution de la vente, ou sa mise en possession, si le retard ne vient que du fait du vendeur.

Art. 1654. Si l'acheteur ne paie pas le prix, le vendeur peut demander la résolution de la vente.

And there are analogous provisions in regard to exchanges in Arts. 1704, 1705.

<sup>5</sup> For instance, if one party after partly performing makes default, the most profitable course open to the other party may be simply to do nothing. Dissolution under Art. 1184 involves return of whatever has been received. The negative right of retention does not.

than those of the Roman or of the English law. He may have the contract dissolved with the result that he no longer is bound to perform, or, if he has already performed, that he gets back what he has given, in either case with damages, or he may have the other party compelled to perform, if that is possible.<sup>1</sup> The right to have the contract dissolved, like the right of retention, applies to all bilateral contracts, though not absolutely without exception.<sup>2</sup>

The provisions of the French law have some peculiarities of detail. In the first place, the dissolution is not effected by the mere non-performance of one party. An application to the court is necessary.<sup>3</sup> This may be made by a defendant as a means of defending himself from a suit;<sup>4</sup> but the express provision of the statute is for a direct application by the party claiming dissolution. He would therefore normally be a plaintiff rather than a defendant. Nor is the mere non-performance of the defendant sufficient foundation for a suit for dissolution. The party claiming dissolution must first put him in default by legal summons to perform or by

<sup>1</sup> In France, as well as in Germany, the right to specific performance of obligations is only limited by actual impossibilities. There are not technical difficulties in addition, as in English law. 9 HARVARD LAW REVIEW, 78, n. 2.

<sup>2</sup> In sales of movable property, if the buyer becomes bankrupt after acquiring possession of and before paying for the goods, the seller cannot have the sale dissolved and thereby regain the goods. Cour de Cassation, 13, Mar. 1888, *Journal du Palais*, 1890, I, 393. This doctrine applies to incorporeal movables. Cass. 3 Mar. 1890, *Jl. du Pal.* 1891, I, 140. But in general, bankruptcy leaves unchanged the rights given by Art. 1184; one who has made a lease or exchange of property or a sale of immovable property may have the transaction dissolved for non-performance by the other party due to bankruptcy, even after transfer of possession and title. See note to case last cited. In case of bankruptcy before delivery of the goods, the syndic may take them on paying the contract price. If he refuses to do this, the seller may have the contract dissolved. Whether he is also entitled to a claim for damages, provable against the bankrupt's estate, has been somewhat disputed. In Belgium this right is allowed. Cass. Belgique, 7 Feb. 1889; *Jl. du Pal.* 1890, 2, 1, and a similar decision is Paris, 4 Mar. 1886, *Jl. du Pal.* 1887, I, 194. But the rule in the French Cour de Cassation is otherwise, Cass. 16 Feb. 1887, *Jl. du Pal.* 1887, I, 353 (reversing the decision of the Cour de Paris just cited); Cass. 8 Apr. 1895, *Jl. du Pal.* 1895, I, 268. This general question is elaborately considered, including references to the legislation of other countries in *Des Droits du Vendeur à livrer dans la Faillite de l'Acheteur*, by C. Appleton (Paris, 1887).

There are some minor exceptions also to the general rule of Art. 1184, Larombière, III. 108; Code Civ. Art. 1978.

<sup>3</sup> Thus a master cannot dismiss summarily a servant or employee whose conduct is unsatisfactory before the expiration of the time fixed by the contract of employment. The master must apply to the court to have the contract dissolved. Cour de Paris, 1 Feb. 1873, *Jl. du Pal.*, 1873, 444.

<sup>4</sup> Saleilles, *Annales de Droit Comm.* VII. 25.



some equivalent act.<sup>1</sup> The very nature of some contracts, however, is such that mere non-performance necessarily involves default. If performance to be effectual must be before a certain day or fixed time, for instance if the contract was for furnishing provisions to a ship which was to sail on a fixed day, the mere lapse of time without performance puts the debtor in default.<sup>2</sup> The same result follows if performance is promised at the creditor's domicile or some specified place other than the debtor's domicile, and at the time when the debtor should perform he is not at the agreed place prepared to do so.<sup>3</sup> Again, if the debtor by his words or conduct has given the creditor cause to believe performance would not be made, this will serve instead of a formal putting in default. The debtor cannot take the objection that his adversary has not done what his own conduct had authorized him not to do.<sup>4</sup> Finally, it may be expressly stipulated in the contract that in case of non-performance there shall be dissolution *de plein droit*.<sup>5</sup> The effect of this provi-

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<sup>1</sup> Art. 1139. Le débiteur est constitué en demeure, soit par une sommation ou par autre acte équivalent, soit par l'effet de la convention, lorsqu'elle porte que, sans qu'il soit besoin d'acte et par la seule échéance du terme, le débiteur sera en demeure.

In commercial matters a letter or telegram has been held to serve to put a party in default. Rouen, 23 Dec. 1880, JI. du Pal. 1882, 1095; Paris, 6 Nov. 1874, JI. du Pal. 1877, 1026, and note; but the contrary was held in Paris, 1 Dec. 1874, JI. du Pal. 1877, 1026. See also Caen, 13 March, 1876, JI. du Pal. 1877, 1027. It must be subsequent to the expiration of the time fixed by the contract for performance, and must be a demand for performance and not look primarily to a dissolution of the contract. Rouen, 23 Dec. 1880, JI. du Pal. 1882, 1095.

<sup>2</sup> Larombière, III. 149. Similarly where the performance of a contract necessarily requires time, as to cut standing timber, failure to begin the work until it has become impossible to complete it in a reasonable time makes formal putting in default unnecessary. Cass. 17 Feb. 1869, JI. du Pal. 1869, 386. See also Rennes, 10 Dec. 1875, JI. du Pal. 1876, 1014. But if the contract merely specifies that wheat is to be delivered in a certain month, the seller must be put in default formally before the buyer can have the sale dissolved. Rouen, 23 Dec. 1880, JI. du Pal. 1882, 1095.

<sup>3</sup> Larombière, III. 150.

<sup>4</sup> Ibid. 152.

<sup>5</sup> This clause is legal, but it must be expressly stated. If the contract provides merely that there shall be dissolution for non-performance this is taken to be but an expression of what the law implies. Larombière, III. 152. In regard to immovable property, further, by Art. 1656 of the Code Civil, even though it is stipulated in the contract that there shall be dissolution *de plein droit* it is still necessary to put the delinquent formally in default, unless it is also stipulated that dissolution shall be "sans sommation ou mise en demeure." In contracts relating to movable property the better view is that these last words are unnecessary: Cass. 29 Nov. 1886, JI. du Pal. 1887, 1, 137 and note.

The contracting parties may also agree that the contract shall not be dissolved for non-performance, or only for non-performance of a certain kind. Larombière, III. 113.

sion is more than to make it unnecessary to put the debtor in default, though that effect it has. It deprives the court of any discretion in decreeing dissolution or granting the defendant delay. The only question the court can consider is whether the contract has been broken.<sup>1</sup>

Except in the case of contracts which are expressly made subject to dissolution *de plein droit*, the plaintiff has no absolute right to have the contract dissolved. If the failure to perform is merely delay, and the contract still admits of substantial performance,<sup>2</sup> the defendant, if he sees fit, may perform, pending the action, at any time before judgment of dissolution is pronounced. Indeed, by taking an appeal, he may perform after that time, that is until judgment on appeal.<sup>3</sup> By the express provision too of the article of the code under consideration (1184), the court may grant such delay as it sees fit within which the defendant may perform.<sup>4</sup> This may be done by delaying to give judgment, or judgment may be given with a proviso that it shall not take effect for a certain time, or subject to the condition that the defendant fails to perform within

<sup>1</sup> Larombière, III. 155; Aubry-Rau, Cours de Droit Civil Français (4th ed.), IV. § 302, b; Cass. 2 July, 1860, JI. du Pal. 1860, 1101. But it does not make application to the court unnecessary to secure dissolution, Aubry-Rau, IV. § 302, b; Larombière, III. 149, though this view was maintained by the older writers. See authorities cited above.

Besides the case where it is part of the contract that the dissolution shall take place *de plein droit*, in sales of chattel property the seller has, by a particular provision of the Code (Art. 1657), an absolute right to have the contract dissolved without delay. This provision is only in favor of the seller. A buyer has not a corresponding right in case of the seller's default. In such sales, if goods ought to be taken by the buyer in instalments, failure to take one instalment gives rise to a right to have the whole contract dissolved, as it is held to be indivisible for this purpose. Larombière, III. 147, 148.

<sup>2</sup> In Cass. 13 Feb. 1872, JI. du Pal. 1872, 133, there was involved a contract for the manufacture of cloth. The manufacturer was prevented by war from furnishing the goods at the stipulated time. The buyer sued for dissolution of the contract with damages while the manufacturer claimed to be wholly released from the contract by impossibility. It was held that the parties not having made it appear that the time was essential, it could be performed after the interruption caused by the war had ceased, and specific performance was ordered.

<sup>3</sup> Larombière, III. 144; Demolombe, Traité des Contrats, II. § 515 *et seq.* In Holland, however, it is held that by putting a delinquent party to a contract formally in default, the other party acquires a right to have the contract dissolved, which cannot be destroyed by subsequent performance. See a decision of the High Court of the Netherlands, 14 Dec. 1893, JI. du Pal. 1894, 4, 29.

<sup>4</sup> There is a special provision to the same effect in regard to sales of immovable property, contained in Art. 1655 of the Code Civil.



a certain time.<sup>1</sup> But one delay is allowable, however. The court cannot extend the period originally granted.<sup>2</sup>

The nature of some contracts is such that, though there is no express provision for the case in the Code Civil, delayed performance or offer of it need not be accepted and will not always avert the dissolution of the contract. If the contract relates to a mercantile matter,<sup>3</sup> especially if it is for the purchase and sale of commodities which fluctuate in price from day to day,<sup>4</sup> or if for any reason the exact time specified in the contract is of importance, a stricter rule prevails. In such cases the normal and proper course to be taken by a party to a contract who wishes to avoid it because of the failure of his co-contractor to perform at the time specified in the contract, is immediately to make formal demand for performance, and, not receiving it, to give notice that if performance is not rendered within a stated short time, the dissolution of the contract will be claimed. The time thus fixed is not necessarily conclusive; the court may grant such delay as seems to it proper under the circumstances,<sup>5</sup> and although no time is fixed in the formal demand for performance, subsequent offers to perform not made within a time reasonable under all the circumstances of the case may be refused and dissolution of the contract insisted upon.<sup>6</sup> Nevertheless it is well to specify in the demand the extreme period of time within which performance will be accepted.<sup>7</sup> In contracts for the delivery of merchandise twenty-four hours is fixed by custom as a reasonable time.<sup>8</sup>

Analogous to the case of performance delayed beyond the stipulated time is the case of an offer of performance, imperfect or incomplete, from other causes than delay. It is laid down that where the agreement consists of a positive engagement to do or give a particular thing, the performance being single and indivisible, the agreement may be dissolved if the engagement is not

<sup>1</sup> Larombière, III. 145, 146.

<sup>2</sup> Ibid.

<sup>3</sup> Paris, 12 Aug. 1870, *Jl. du Pal.* 1872, 756.

<sup>4</sup> Paris, 30 Jan. 1873, summarized in Sirey & Gilbert's annotated Code Civil, ¶ 33 of note to Arts. 1609-1611.

<sup>5</sup> Bordeaux, 8 Aug. 1829, summarized in ¶ 17 of the note above referred to; Cass. 15 Apr. 1845, *Jl. du Pal.* 1845, 1, 591.

<sup>6</sup> Paris, 12 Aug. 1870, *Jl. du Pal.* 1872, 756.

<sup>7</sup> See Cass. 13 June, 1876, *Jl. du Pal.* 1877, 413.

<sup>8</sup> Paris, 12 Aug. 1870, *Jl. du Pal.* 1872, 756.

exactly fulfilled.<sup>1</sup> But a slight deficiency or excess in the amount of a quantity of goods forming the subject matter of a contract is held not to warrant its dissolution.<sup>2</sup>

If the defendant fails to perform seasonably or within any period of delay granted by the court, the contract must ordinarily be dissolved.<sup>3</sup> Though the defendant's non-performance was due to supervening impossibility, which would excuse him from liability in damages, the plaintiff is none the less entitled to such dissolution.<sup>4</sup> If, however, by accidental mischance it had become impossible for the performance to be made at the stipulated time merely, the cause of the delay would be taken into consideration by the court and greater leniency in granting delay would be shown than if the delay were wilful. But in such a case if by special agreement or the nature of the case performance must necessarily take place, if at all, at the time originally fixed, delay, though caused by accident, is fatal.<sup>5</sup>

<sup>1</sup> Larombière, III. 96; Aubry-Rau, IV. 83, § 302. Compare Demolombe, II. §§ 498, 499. In Cass. 12 Apr. 1843, *Jl. du Pal.* 1843, 2, 8, the plaintiff was held entitled to the dissolution of a contract to buy a steam engine because the defendant delivered it without a smoke-stack. It was held immaterial that the deficiency could be easily supplied and that therefore damages would be a sufficient indemnity. In Cass. 4 Dec. 1871, *Jl. du Pal.* 1871, 589, it was held of no avail that the seller after having made an offer of defective goods, subsequently put them in satisfactory condition and offered them again. In a later stage of the same case, Aix, 8 Aug. 1872, *Jl. du Pal.* 1873, 1088, the court refused to give effect to a custom by which goods if above a minimum quality, though below that stipulated for in the contract, must be accepted by the buyer, with a money indemnity for the deficiency in quality. If goods are to be made according to sample, non-conformity to the sample affords ground for dissolving the bargain. Rouen, 22 July, 1872, *Jl. du Pal.* 1873, 1086; Cass. 20 Jan. 1873, *Jl. du Pal.* 1873, 1161; Rouen, 26 July, 1878, *Jl. du Pal.* 1878, 1127.

The principle seems to have limits, however. In Cass. 4 Mar. 1872, *Jl. du Pal.* 1872, 1140, there was involved a contract for sub-letting an apartment and shop, and for the sale of certain articles of furniture in the shop. One of these articles was not delivered. It was held that the agreement for the sale of the furniture was merely an accessory stipulation, and failure to deliver one article did not afford ground for dissolution of the bargain.

<sup>2</sup> Cass. 12 Feb. 1887, *Jl. du Pal.* 1877, 782. See also ¶ 37 of the notes to Arts. 1612, 1613 in the annotated Code Civil of Sirey and Gilbert.

<sup>3</sup> If the contract is divisible in its nature the court may in its discretion dissolve it as a part only. Cass. 26 Apr. 1870, *Jl. du Pal.* 1870, 663.

<sup>4</sup> Larombière, III. 92; Aubry-Rau, IV. § 302, 83, and note 82; Demolombe, II, § 497; Cass. 30 Apr. 1878, *Jl. du Pal.* 1879, 493; Cass. 14 April, 1891, *Jl. du Pal.* 1894, 1, 391. In the case last cited the defendant, the lessee of a vineyard, was prevented from carrying out the stipulations of the lease by an invasion of phylloxera. The lessor was held entitled to have the lease dissolved.

<sup>5</sup> Larombière, III. 93.



Even though the plaintiff himself was guilty of the first breach of the contract, and this breach was the reason that the defendant subsequently committed a breach the plaintiff may have the contract dissolved. The defendant may in such a case, it is said, suspend the execution of his agreement until the plaintiff performs, but he may not be guilty of a positive infraction of the agreement if he does not want it dissolved. If he is guilty of such a positive infraction, the plaintiff may have the contract dissolved though he is liable in damages for his own prior breach of contract.<sup>1</sup>

There is nothing in the words of article 1184 to indicate that part performance of a contract by the party ultimately guilty of a breach affects the right of the other party to have the contract dissolved. But the obvious harshness of applying the rule universally has led to exceptions, the extent of which has not been and perhaps from the nature of the case cannot be very exactly defined, though some definition has been attempted. On the one hand it has been said that non-performance of a stipulation which is purely accessory and independent of the principal contract cannot afford ground for dissolution, such non-performance being sufficiently made good by damages.<sup>2</sup> Also if the infraction is of a purely negative stipulation the judge will weigh the gravity of the breach, and if not of serious importance will allow the injured party damages only.<sup>3</sup> And in any case a breach of trifling importance will not justify a claim for dissolution.<sup>4</sup> Further, if the performance has not become impossible, either because time was of the essence of the contract or for other reason, the court by

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<sup>1</sup> Larombière, III. 102; Cas. 8 Jan. 1850, JI. du Pal. 1850, 2, 100. In this case the plaintiff, the owner of mining rights, had entered into a contract with the defendant, by which the defendant was given the right to carry on mining operations but agreed among other things not to do so before being authorized by the prefect — this authorization being essential by law. The plaintiff, among other things, agreed to take the steps necessary to secure the authorization. He subsequently refused to do so, and the defendant thereupon began to mine. It was held that the plaintiff was entitled to have the contract dissolved, but without prejudice to the defendant's claim for damages.

<sup>2</sup> Cass. 29 Nov. 1865, JI. du Pal. 1866, 32; Amiens, 3 Aug. 1881, JI. du Pal. 1882, 1, 695. Demolombe, II. § 498-500, is of opinion that even in such a case the court may grant dissolution, but that it has discretion to refuse.

<sup>3</sup> Cass. 26 May, 1868, JI. du Pal. 1868, 890. In this case the defendant had sold the plaintiff his stock-in-trade and business, agreeing not to compete. He was subsequently guilty of some acts of competition which caused little damage. The court held that the plaintiff could not have the bargain dissolved. See also the case stated in note 2, p. 92.

<sup>4</sup> Larombière, III. 95. Cass. 29 Nov. 1865, JI. du Pal. 1866, 32; Cass. 10 June, 1856, JI. du Pal. 1857, 867.

granting the defendant a delay may avoid a dissolution of the contract.<sup>1</sup> Perhaps the most difficult case is where the infraction in question is a serious one and of an essential part of the agreement, but where so much that cannot be undone has been done under the contract, that serious injustice would arise if the contract were dissolved. It seems probable that the court would deal with such a case as equity required, without allowing itself to be hampered by general rules.<sup>2</sup>

Non-performance of one contract may even afford ground for dissolution of another, but only in case the two agreements are related to each other, as, if the making of one was the consideration of the other.<sup>3</sup>

The injured party may waive or renounce his right to a dissolution of the contract either expressly or by conduct irreconcilable with the idea of an intention to exercise or reserve the right. The fact that a plaintiff has previously brought action for the enforcement of a contract and obtained a decree that it be specifically carried out does not, however, operate as a waiver of the right to bring a subsequent action for dissolution.<sup>4</sup> Nor does merely receiving performance without objection necessarily imply a recognition of the validity of the performance and hence operate as a bar.<sup>5</sup>

<sup>1</sup> Larombière, III. 96. Mere delay in the absence of special circumstances, it is said, cannot in the nature of things be better repaired than by performance, even though it be tardy, if nothing in the agreement forbids.

<sup>2</sup> Paris, 21 Apr. 1896, JI. du Pal. 1897, 2, 9. In this case the Théâtre Français sought an injunction and conditionally the dissolution of its contract with Coquelin the elder. By this contract the actor had bound himself, among other things, to act nowhere except at the Théâtre Français. The latter agreed among other things to pay the actor a retiring pension after a specified period. The contract was carried out on both sides for more than twenty years, and Coquelin had become entitled to his retiring pension, when he asserted the right to act elsewhere. The court granted an injunction and damages for every breach of the agreement, but refused to dissolve it. See further Cass. 14 Apr. 1891, JI. du Pal. 1894, 1, 391; Cass. 11 Apr. 1888, JI. du Pal. 1888, 1, 520; Cass. 29 Nov. 1865, JI. du Pal. 1866, 32.

<sup>3</sup> Larombière, III. 101.

<sup>4</sup> Cass. 27 Mar. 1893, JI. du Pal. 1896, 1, 443; Larombière, III. 209. This was otherwise in the Roman law. The seller in demanding the price was held to have waived the right of rescission bargained for by a commissory pact, and conversely if he demanded rescission he waived his right to demand the price: *Si venditor pretium petat legi commissariae renunciatum videtur, nec variare et ad hanc redire potest*, D. 18. 3. 7.; Papinianus . . . scribit . . . nec posse si commissariam elegit postea variare. D. 18. 3. 4. § 2.

<sup>5</sup> Paris, 18 Mar. 1870, JI. du Pal. 1870, 1179. Saleilles, *Ann. de Droit Comm.* VII. 42. In contracts of sale the seller is liable for latent defects, Code Civ., Art. 1641, even



Although the literal construction of Art. 1184 might seem to lead to a different conclusion, a party seeking a remedy for breach of contract by the other party is entitled to appropriate damages as well in the case where he seeks or is awarded judgment that the contract be specifically enforced as in the case where he asks that the contract be dissolved.<sup>1</sup>

Analogous to the case where a party to a contract has failed to perform his obligations, is the case where before the time fixed for such performance, it becomes certain or probable from a party's words, actions, or circumstances that he will not perform when the time arrives. The French code contains no general provision for this sort of case. There are, however, special provisions which cover part of the ground. Supervening insolvency or a diminution by a debtor of any security given to the creditor by him deprive him of any term of credit given by the contract. The creditor can demand concurrent performance, unless the debtor will give him security.<sup>2</sup> Again in the case of sales not only a buyer who is vexed by an action in regard to the subject matter of the sale, but one who has reason to fear being vexed in the future by such an action may suspend payment of the price until the seller puts a stop to the cause of the trouble or gives security.<sup>3</sup> In a case of threatened non-performance not within these special provisions it seems probable that the court would grant an appropriate delay, and if the threat then had become a reality decree a dissolution, otherwise not.<sup>4</sup>

Judgment for dissolution when given takes effect by relation

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though not aware of them himself, Art. 1643; but not for defects which the buyer might discover by examination, Art. 1642.

<sup>1</sup> Larombière, III. 140. The Italian Codice Civile, Art. 1165, which is otherwise a literal translation of Art. 1184 of the French Code Civil, avoids the ambiguity of the latter by adding the words "in ambedue i casi" after the provision for damages.

<sup>2</sup> Code Civil, Arts. 1188, 1613; Cass. 9 Jan. 1854, JI. du Pal. 1856, 2, 552; Paris, 22 Jan. 1856, JI. du Pal. 1856, 1, 217. This provision is not confined to cases of actual bankruptcy. If a buyer's solvency is so precarious as to make payment by him doubtful it is enough. Paris, 11 July, 1853, JI. Pal. 1853, 2, 376. But merely the seller's fears or a report of the buyer's insolvency will not justify a refusal to deliver. Cass. 26 Nov. 1861, JI. du Pal. 1862, 332; Cass. 24 Nov. 1869, JI. du Pal. 1870, 280; Cass. 8 Aug. 1872, JI. du Pal. 1870, 157.

<sup>3</sup> Code Civil, Art. 1653. But if the difficulty affects only a small part of the property sold, the buyer cannot retain the whole price, but only a portion corresponding to the value of that part. Troplong, Vente, II. § 612. The threat or fear of eviction is not ground for dissolution of the sale but only for delay in paying the price. Cass. 2 Jan. 1839, JI. du Pal. 1839, 1, 18.

<sup>4</sup> Larombière, III. 100.

from the date of the contract,<sup>1</sup> and each party is bound to return what he has received. Each may, however, retain what he has received until the other party concurrently makes return.<sup>2</sup> If return is impossible, damages are awarded instead;<sup>3</sup> but one who has put it out of his power to return what he has received cannot ask for dissolution, though it may be decreed at the suit of the other party.<sup>4</sup>

The wide influence of the Code Napoléon on the legislation of other countries has made the preceding discussion of the law of France applicable not to that country alone. In Belgium the Code Napoléon as such is in force, and the law of the country is regarded as French law.<sup>5</sup> In Holland the Code Napoléon is the foundation of the civil code in force, and Art. 1302 of the latter corresponds to Art. 1184 of the former.<sup>6</sup> In Italy the Codice Civile has the same basis. Art. 1165 of the latter corresponds to the French Art. 1184,<sup>7</sup> and Art. 1469 to the French Art. 1612.<sup>8</sup> In Baden and some of the German Rhine provinces the Code Napoléon is still in force.<sup>9</sup> In Spain the first part at least of the French Article 1184 authorizing dissolution of a contract for breach seems to have been early adopted<sup>10</sup> and the provision was carried across the ocean in that form to Mexico, Peru, and doubtless other Spanish-American colonies.<sup>11</sup> In Spain itself,

<sup>1</sup> Cass. 31 Dec. 1856, JI. du Pal. 1857, 337; Cass. 5 Dec. 1881, JI. du Pal. 1882, 248.

<sup>2</sup> Cass. 2 June, 1886, JI. du Pal. 1890, 1, 930.

<sup>3</sup> Cass. 14 Dec. 1875, JI. du Pal. 1877, 31.

<sup>4</sup> Bordeaux, 7 Mar. 1845, JI. du Pal. 1846, 2, 67.

<sup>5</sup> Saleilles, Ann. de Droit Comm. VII. 27; Zachariä von Lingenthal und Crome, Handbuch des Französischen Civilrechts (8th ed.), I. 49, note 4.

<sup>6</sup> Zachariä von Lingenthal, I. 49, n. 4. A decision of the High Court of the Netherlands, 14 Dec. 1893, JI. du Pal. 1894, 4, 29, shows a minor difference between the law of the Netherlands and France referred to, *ante*, p. 88, n. 3.

<sup>7</sup> The Italian article is a literal translation of the French, except that four words are inserted for greater clearness. See *ante*, p. 93, n. 1. Giorgi, Teoria delle Obbligazioni, IV. 212, n. 1.

<sup>8</sup> Giorgi, IV. 203.

<sup>9</sup> Aubry-Rau, I. 20. Entscheidungen des Reichsgerichts, I. 217.

<sup>10</sup> Schmidt, Law of Spain and Mexico, 2, 96. "If the contract be synallagmatic, or one by which the contracting parties have assumed reciprocal obligations, the failure of one to comply with his agreement entitles the other to demand the rescission of the contract."

<sup>11</sup> Schmidt, 98: Code Civil Méxicain, Résumé analytique, R. de la Grasserie (Paris, 1895), 114; Code Civil Péruvien. Résumé analytique, R. de la Grasserie (Paris, 1896), 166. The Mexican Code also expressly provides a right to recover damages in connection with the dissolution of the contract, and gives a right specific performance as an alternative.



however, Art. 1124 of the latest Civil Code,<sup>1</sup> contains in substance the whole of the French Art. 1184, and the French Art. 1612 is repeated in the Spanish Art. 1466. In Poland the Code Napoléon was introduced and is still in force for the most part.<sup>2</sup> In this country the Code of Louisiana, drawn chiefly from the same source, repeats, almost literally, the provisions of the French law on the matter in question.<sup>3</sup> And in Lower Canada the Civil Code allows at least a general right to treat a broken contract as dissolved.<sup>4</sup>

In Germany (except in the Rhine country where French law prevails), the law so far as it is not changed by statute, following the rule of the Roman law, denies to one party to a bilateral contract the right to withdraw from it or treat it as dissolved because of breach of the contract by the other party.<sup>5</sup> Breach of express or implied warranty of goods sold authorizes this remedy and it is also allowed where performance by the party in default has no longer any value for the other party. Further, where performance has become impossible by lapse of time or other reason, in effect, if not in name, the aggrieved party by refusing to perform until he receives performance secures the same result.<sup>6</sup> But many cases

<sup>1</sup> Promulgated July 24, 1889.

<sup>2</sup> Lehr, *Droit Civil Russe*, Introduction; Zachariä von Lingenthal, I. 50; Foucher, *Code Civil de Russie*, Art. 890.

<sup>3</sup> Arts. 2046 and 2047 are equivalent to Art. 1184; and Art. 2487 is equivalent to Art. 1612 of the French Code. Arts. 1911 *et seq.* of the Louisiana Code provide for formal methods of putting a party in default, similar to those of the French law. Specific performance is not allowed in Louisiana when compensation can be made in damages. Code, Art. 1927; *Mirandona v. Burg*, 49 La. An. 656.

<sup>4</sup> Art. 1065 provides that the party aggrieved may have damages, or specific performance if that is possible "or that the contract from which the obligation arises be set aside." Art. 1066 allows him to "require also that anything which has been done in breach of the obligation shall be undone, if the nature of the case will permit."

<sup>5</sup> Although Windscheid regards the right to treat a contract as dissolved and recover back whatever has been given under it because of the failure of the other party to perform, as contrary to the fundamental principles of the bilateral contract, in that a promise or right of action is all that has been bargained for and that is still enforceable (Lehrbuch, II. § 321, 2, note 10), yet he maintains that the doctrines of the modern law in regard to mistake necessarily lead to the conclusion that not only one who performs under the mistaken idea that the other party has already performed, but also one who performs under the mistaken expectation that the other party is going to perform, is entitled to treat the contract as dissolved and recover what he has given. Lehrbuch, II. § 321, 2, note 10 a. But, as Windscheid himself admits, the prevailing view is otherwise. For this see Dernburg, II. § 21, note 6; Römer, in *Zeitschrift für Handelsrecht*, XIX. 123.

<sup>6</sup> See cases in note 2, p. 96.

are outside these limits.<sup>1</sup> The right to treat the contract as dissolved may be secured by special agreement (*Lex commissoria*),<sup>2</sup> and in some of the states of Germany, notably Prussia,<sup>3</sup> the rule of the common law has been changed.

Imperial legislation, also, whenever it has dealt with the subject, has enlarged the scope of the right in question. Thus the com-

<sup>1</sup> In a decision of the Amtsgericht, Celle, 1 July, 1879, Seuffert's Archiv, XXXV. 19, the plaintiff agreed to sell and the defendant to buy real estate. A small instalment of the price was paid and the rest was deferred. Possession was to be given on payment of the second instalment of the price. This was not paid and possession was not given, and the defendant became wholly irresponsible financially. Two years or more later the plaintiff sued for the dissolution of the contract, alleging these facts, and that he was unable to sell his property while the contract was in force. The suit was dismissed. The remedy sought, it was said, is only permissible when, owing to the default, performance of the contract is no longer valuable. If a party wishes the right to dissolve a contract in any case of breach he must make a commissory pact.

Nearly as strong a case is a decision of the Oberlandesgericht, Cassel, 9 Apr. 1891, Seuff. Arch. XLVII. 147, where the seller, after making one offer of performance, which on suit was held insufficient, was allowed to enforce specifically a contract for the sale of land, though it was more than four years and a half after the contract before a proper offer was made by the plaintiff. See, however, *contra*, a decision of the Obergericht Wolfenbittel, 2 Oct. 1877, Seuff. Arch. XXIII. 404.

In a decision of the Reichsgericht, 15 June, 1896, Seuff. Arch. LII. 144, it appeared that the plaintiff bought from the defendant the business of publishing the Munich Directory, part of the payment being deferred. The plaintiff made default in an instalment of the price, and the defendant at once started a rival publication. The plaintiff sued for the suppression of this and for damages. The defendant made counter claim for the unpaid price. The court held the plaintiff could not recover because he had not performed. The defendant could not treat the contract as dissolved, but as he had made performance impossible, he could only recover the value of what he had given and the burden was upon him to prove what this was and that it was more than he had received.

See also a decision of the Oberstgerichtshof für Bayern, 30 Apr. 1875, Seuff. Arch. XXXI. 158.

<sup>2</sup> See Bürgerliches Gesetzbuch, §§ 346-361. If one entitled by commissory pact to dissolve a contract, and also entitled to sue for its breach, manifests a definite election of one right (as by suit) he loses the other as in the Roman law (see *ante*, p. 92, n. 4). Reichsgericht, 21 May, 1897, Seuff. Arch. LII. 425. But it was held in this case that a dunning letter after default was not a definite election to abide by the contract.

In a decision of the Oberamtsgericht, Wiesbaden, 19 Dec. 1856, Seuff. Arch. XI. No. 232, it was held that in the case of perishable goods the agreement upon a fixed time within which the contract must be fulfilled indicates an intention to allow either party to withdraw from the contract for default of the other in performing within this time. A similar decision as to goods intended for consumption or resale and subject to frequent change of price is that of the O. A. G. München, 21 July, 1856, Seuff. Arch. XI. No. 141. The court, distinguishing the case from a contract in regard to land, say the non-performance is not simply *mora* but breach of contract.

<sup>3</sup> Förster-Eccius, Preussisches Privatrecht (4th ed.), II. 90 (note 75), 307, 318; Entsch. R. G. XXXVI. 222; Seuff. Arch. XXIV. No. 228; *Ibid.* XXI. No. 114.



mercial code, or *Handelsgesetzbuch*, makes important provisions in regard to contracts of sale coming under the head of commercial transactions.<sup>1</sup> If, in such contracts, the buyer is in default with the price and the goods have not been delivered, the seller has among other remedies that of acting as if the contract had never been entered into.<sup>2</sup> If the seller is in default the buyer has a similar right, and in this case it is not essential that the contract should not have been fulfilled by the party also who is not in default.<sup>3</sup> Whatever has been given under the contract must be returned.<sup>4</sup> If a party wishes to avail himself of this right he must give the other party notice of the fact after performance is due, and if the nature of the case allows it, grant a specified term for performance.<sup>5</sup> This is unnecessary where the contract itself provides that the goods shall be delivered at a time certain or within a fixed period; and in such a case prompt notice must be given if it is intended to compel the defaulting party to specific performance, rather than to the payment of damages or the dissolution of the contract.<sup>6</sup> If performance on both sides is divisible, a party can only withdraw from the unfulfilled portion of the contract.<sup>7</sup>

Besides being applicable to but a limited number of cases, the value of the remedy of withdrawing from the contract or treating it as dissolved is much decreased by the rule that one who adopts this remedy not merely frees himself from any obligation to perform, but discharges the other party from liability in damages for failure to perform.<sup>8</sup> The remedy is, therefore, of practical value

<sup>1</sup> Such contracts are substantially contracts for the purchase and sale of personal property in order to resell it, whether in the same form or not. *Handelsgesetzbuch*, Art. 271, 272; Hahn, *Commentar zum Handelsgesetzbuch*, II. 3-42, 76.

<sup>2</sup> H. G. B. Art. 354; Hahn, II. 352.

<sup>3</sup> H. G. B. Art. 355; Hahn, II. 359.

<sup>4</sup> Hahn, II. 358.

<sup>5</sup> H. G. B. Art. 356; Hahn, II. 363.

<sup>6</sup> H. G. B. Art. 357; Hahn, II. 375.

<sup>7</sup> H. G. B. Art. 359; Hahn, II. 390. But he may withdraw from performance of all the remaining instalments. Failure by either the buyer or seller to perform as to any instalment justifies the other party in refusing to deliver or receive any further instalments. *Reichsoberhandelsgericht*, 7 Mar. 1871, *Entsch.* II. 84; 14 Mar. 1874; *Entsch.* XIII. 78; 21 Mar. 1874, *Entsch.* XIII. 102; 5 Apr. 1875, *Entsch.* XVI. 190, 193, *Oberlandesgericht, Braunschweig*, 9 Jan. 1891, *Seuff.* XLVI. 339.

In a decision of the R. O. H. G. 25 Jan. 1873, *Entsch.* VIII. 423, it was even held that failure on the part of the seller to deliver the stipulated quantity, justified refusal to pay for what had been delivered until the remainder was delivered, though the price was not a lump sum.

<sup>8</sup> Hahn, II. 358; *Entsch.* des R. O. H. G. XVII. 422, 13 Feb. 1875; *Entsch.* des *Reichsgerichts*, XXXIX. 170, 11 May, 1897.

only when the party seeking it has made a bad bargain, and is consequently not damaged by the loss of it. Further a party who has received anything under a contract cannot treat it as dissolved unless he is able to return uninjured what he has received.<sup>1</sup>

After January 1, 1900, statutory rules will be of wider application. On that day a practically complete codification of German law will take effect. The present *Handelsgesetzbuch* will be superseded by a new one, and the *Bürgerliches Gesetzbuch*, which has been in process of formation for nearly twenty years, will become operative. Owing to the general provisions of the *Bürgerliches Gesetzbuch*, the new *Handelsgesetzbuch* does not contain the special provisions of the previous one. Commercial contracts are thus made, so far as the matter in question is concerned, subject to the same rules as other contracts. One special provision, however, is retained. If a commercial sale provides for delivery at a fixed time or within a fixed period, the buyer may withdraw from the contract if delivery is not made promptly; and if he desires specific performance instead of damages or dissolution of the contract, he must notify the other party promptly.<sup>2</sup>

The provisions of the *Bürgerliches Gesetzbuch* will generally enable a party to a contract to treat it as dissolved for non-performance by the other side.<sup>3</sup> Unless he himself has parted with something under the contract which he wishes to recover, his attitude if he avails himself of the remedy will be that of a defendant, not as in France that of a plaintiff. In some cases, however, no such right is given. Certainly where the plaintiff's default in performance whether total or partial may still be made good, time

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<sup>1</sup> Thus temporary use of a machine debars the buyer from returning it after it has proved unsatisfactory. Case last cited.

<sup>2</sup> § 376. This corresponds to § 357 of the present H. G. B.

<sup>3</sup> § 325 provides that in case the entire performance due from one party becomes impossible because of circumstances for which he is responsible, the other may claim damages for the non-performance or withdraw from the contract. The same is true in case of partial impossibility where the part performance which is possible has no value by itself to the party receiving it. § 326 provides that in case a party to a contract is in default the other party may set a fixed time with the declaration that he will not accept performance after that date. If performance does not follow within the time specified, he may claim damages for non-performance (he cannot claim specific performance) or withdraw from the contract. The provision of § 325 in regard to part performance also applies here. Further, if the performance of the contract is of no value to the party to whom it is due in consequence of delay in offering it he has the rights given by § 326 without the necessity of fixing a period of grace. § 454 contains the limitation that if a seller has fulfilled the contract on his part and given credit for the price, he cannot thereafter withdraw from the contract.



neither being of the essence from the nature of the contract or because of notice given as provided by § 326, the defendant must protect himself in some other way. And even where the contract may be treated as dissolved, here as in the case of the provisions of the *Handelsgesetzbuch*, there is no right given the party aggrieved to make good a claim for damages. Nor can he, presumably, treat the contract as dissolved unless he can return what he has received.

In spite of the statutory provisions just considered, therefore, the negative right of refusing to perform unless or until the other party shall do so retains and is likely to retain its importance. It has been a well recognized right for a long time, and for more than a century there has been active discussion in regard to it under the name of the *exceptio non adimpleti contractus*.<sup>1</sup> The discussion<sup>2</sup> has for the most part turned rather on the theoretical nature of the defence than on its practical applications. The main point in dispute has been whether it is part of the plaintiff's case to allege and prove performance. It seems to have been generally conceded from the outset that the plaintiff in order to win his case must prove performance, and it has been general practice at least for the plaintiff's declaration or complaint to contain an allegation of performance.<sup>3</sup> The natural inference would be that the allegation of performance is essential to the plaintiff's case and that such performance is a condition precedent to any actionable right on his part. Such was the prevailing doctrine in the early part of this century.<sup>4</sup> It was a consequence of this doctrine that the so-called *exceptio* was not a proper *exceptio* but merely a denial of an allegation in the plaintiff's declaration. In 1824 an essay by Heerwart<sup>5</sup> supported by new reasoning a contrary view. His theory was that

<sup>1</sup> The use of this name for the defence, or of *exceptio non impleti contractus*, the earlier form, and that still used in Italy — dates from the end of the seventeenth century.

<sup>2</sup> A complete and to some extent annotated bibliography of the German literature relating to the subject till the year of publication (1890) may be found in André, *Die Einrede des nicht erfüllten Vertrages*, 3-13, 23-27. A less complete but good bibliography, especially of more modern writers, is contained in Windscheid, *Lehrbuch des Pandektenrechts* (7th ed. 1891), II. § 321, note 2.

By far the most complete and satisfactory discussion is contained in the book of André. The best short treatment is that of Heerwart, *Archiv. f. d. Civil. Praxis*, VII. 335 (1824). All the general handbooks of German law deal with the subject. The best of these, so far as the point in question is concerned, are Dernburg, *Pandekten*, II. §§ 20, 21, and Windscheid's *Lehrbuch*, cited above, II. § 321.

<sup>3</sup> André, 27, 45.

<sup>4</sup> André, 24, and authorities cited.

<sup>5</sup> *Archiv f. d. Civ. Praxis*, VII. 335.

the plaintiff, in proving that he had performed, was proving matter which, if the pleadings were fully carried out, would be alleged not in the declaration, but in the replication. He maintained that the plaintiff makes out his original case by proving the defendant's matured promise; the defendant in turn makes out his defence by proving the plaintiff's counter promise. This gives rise to a cross-claim equivalent to, and counterbalancing the plaintiff's right; as if to on action on a debt the defendant should plead in set-off an equal debt due him by the plaintiff. In order to meet the defence of a counter promise set up by the defendant, the plaintiff should by replication allege that he has fulfilled his own promise; just as in the case of set-off it would be the duty of the plaintiff to allege in a replication that he had paid the debt claimed by the defendant, not the defendant's duty to allege that the plaintiff had not paid the debt.<sup>1</sup> So it would be matter for replication if the plaintiff's promise was discharged in any other way than by being performed, as by release, waiver or prevention by the defendant or by impossibility of which the defendant bore the risk. *Exceptio non adimpleti contractus* is a misnomer for the defence, upon Heerwart's theory, as the words imply that the plaintiff's non-performance is part of the defendant's exception. *Exceptio prius adimplendi contractus* has been suggested as a more appropriate name.

This theory of the defence became the prevailing one, both with legal writers<sup>2</sup> and with the courts.<sup>3</sup> But whether the plaintiff must

<sup>1</sup> The burden is universally on the debtor to prove that he has performed. Dernburg, II. § 21, I. 1.

<sup>2</sup> André, 24, marshals the writers. But legal opinion is by no means unanimous. The method of argument ordinarily followed is to establish by historical or analytical reasoning the nature of a bilateral contract and then deduce the consequences. Two views have divided most of the writers: (1) Two independent obligations are created by a bilateral contract but each is to perform not in any event but in return for counter performance. Each obligation is, therefore, conditional on the performance of the other. (2) Two independent obligations are created, but on grounds of justice a defence is given to each party by means of which he can compel performance by the other party precedent to or concurrent with his own. For the first of these views Keller is regarded as the ablest champion. The second is supported by Windscheid, Dernburg and most recent writers. German ingenuity has not been exhausted by these two views. Though little support has been given other views, the further suggestion has been made; (3) that the promises create wholly independent obligations; (4) that there is but a single united obligation, namely that both performances shall take place. See Windscheid § 321, note 2; André, 28. Bechmann (Der Kauf, I. 568) distinguishes the "genetic synallagma" or bilateral contract in its creation where mutuality is essential from the "functional synallagma" or bilateral contract in its performance where mutuality is not essential but merely equitable. Bechmann believes that neglect to observe this distinction has led Keller and those who take the same view into the position they occupy.

<sup>3</sup> André, 17. And see the case stated in the following note.



allege and prove performance as part of his original case or as a reply to a defence is a question of little practical importance. Its principal direct bearing is stated by André to be in case of judgment by default against the defendant, when the plaintiff in his declaration does not allege that he has performed his part of the contract.<sup>1</sup> As the ordinary practice of plaintiffs is to allege that they have performed,<sup>2</sup> whether it is or is not essential to do so, it is obvious that decision is not often required as to whether the allegation should be in the declaration or in a replication.

Most of the cases which present any real difficulty are those where the plaintiff has either offered to perform or actually performed wholly or partially, and the defence is not that there has been no performance at all but no sufficient or satisfactory performance. The name *Exceptio non rite adimpleti contractus* was invented for this defence about the middle of the eighteenth century. Its distinguishing feature was that the burden of proof was upon the defendant. Though the conception found favor for a while, it was soon criticised by the writers. It was pointed out that performance of something other than what the contract requires is no performance as far as that contract is concerned, and that the defendant may safely assert that the plaintiff has not performed. If, however, the writers added, the defendant, as often happens, seeks not merely to defeat the plaintiff's claim but to establish an independent right of his own, as the dissolution of the contract, or damages for the plaintiff's defective performance, the burden of making out the facts on which such a right is based rests upon him. This way of dealing with the subject found pretty general acceptance,<sup>3</sup> but a modification of it is strenuously contended for

<sup>1</sup> André, 27. It was of decisive importance also in a decision of the Reichsgericht, 10 Oct. 1890, Seuff. Arch. XLVI. 225. Certain procedure is allowed exclusively for cases where the plaintiff's claim is based wholly on documentary evidence. In this action, which was on a bilateral contract, the defendant claimed that as the plaintiff could not prove by documentary evidence that he had performed on his part, the form of procedure was inapplicable and that consequently the action must be dismissed. The court held the contrary, on the ground that proof of performance was not part of the plaintiff's original case. O. L. G. Celle, 6 Oct. 1886, Seuff. Arch. XLII. 109, is to the same effect.

<sup>2</sup> André, 45.

<sup>3</sup> According to this view since the same facts might be relied on either for the assertion of an independent claim or for a defence the defendant's plea, ing " must set out the object he is seeking by his defence, not merely the facts, leaving the court in the dark with what aim he does so, — whether he wishes to deduce the right to dissolve the contract or to a diminution of the price or to a retention of the price until completion of performance, or finally to indemnify by way of damages." From a decision of the Oberamtsgericht, Dresden, 5 May, 1859; Seuff. Arch. XIII. No. 184.

in the work of André to which frequent reference has been made. He admits that if a plaintiff has performed but half what he was bound to or has not performed at the place or time he should, the defendant need take no initiative at the trial, for the plaintiff must prove performance and the facts evidently indicate that he has not performed. But if the plaintiff agrees to sell a specified article and actually delivers it or builds a house or otherwise does apparently the thing he promised to do, André would have the proof shift and would throw upon the defendant the burden of showing that the apparent performance was not really performance, because the article sold lacked warranted qualities or the house was defectively built.<sup>1</sup> Dernburg supports this distinction<sup>2</sup> and many judicial decisions are in accord with it.<sup>3</sup>

The defence of the *exceptio non adimpleti contractus* is usually called a dilatory one,<sup>4</sup> and the defendant's situation compared to that of a pledgee, who holds the pledge simply to enforce payment by the debtor. The defendant says: "I will not perform as long as you do not," but as André points out this must frequently change into the formula "I will not perform because you have not." This will be so in every case where performance by the plaintiff is or has become impossible;<sup>5</sup> and also where the plaintiff claims that he has performed and does not intend to do anything more in any event. Sometimes it will be uncertain whether the plaintiff may, if he chooses, perform again, as where it is not clear whether time is an essential part of the

<sup>1</sup> A large part of André's book is devoted to establishing this thesis. The distinction suggested seems from the standpoint of the Common Law to amount to this: in one class of cases the plaintiff has made out a *prima facie* case, which will, in the absence of other evidence, sustain the burden imposed upon him of proving performance; in the other class of cases he has not. But the German writers, whether because their procedure does not separate law and fact carefully or for other reasons do not seem to discriminate here between the burden of bringing forward evidence to meet a *prima facie* case, and the burden of finally establishing the essential elements of a claim or defence.

<sup>2</sup> II. § 21 (3d, 4th, 5th eds., modifying views expressed in 1st and 2d editions).

<sup>3</sup> See citations given by André, 72, 120.

<sup>4</sup> André, 127; Dernburg, II. § 21.

<sup>5</sup> In Entsch. R. G. XXXVI. 228 (11 Oct. 1895) the court resorted to rather technical reasoning to make out performance was impossible and thereby to deprive a party of a right to perform again. Under a contract for the sale of rice flour he had furnished inferior goods. After some dispute and delay he offered different flour. The court held that a contract for the sale of unspecified goods became a contract for the sale of specified goods, as soon as goods were furnished under the contract, and that, therefore, if the goods so specified were not in accordance with the contract performance was impossible and the buyer need not accept other goods.



contract. It follows from the theory that the defence is dilatory that the judgment rendered when it is successfully set up is against the defendant subject to the condition of the plaintiff's performance.<sup>1</sup> But here again when the plaintiff has failed to perform irretrievably the judgment must in effect be absolute.

A party is said to be entitled to refuse to perform at all until his co-contractor has completely performed,<sup>2</sup> and, as before, theory has to receive essential modification in practice. If the performances are divisible or payments are to be made in instalments the right of retention is limited to an appropriate portion.<sup>3</sup> And in any case where the defendant has received the essential benefits of the contract he can only retain a part of his own performance by reason of a particular defect which does not seriously impair the benefit of what he has received, not, it is said, because the defence is not technically applicable, but because it would be fraudulent for the defendant to make use of it.<sup>4</sup> This is not the equivalent of restricting the defendant to a counter claim for damages, though obviously

<sup>1</sup> André, 129; Dernburg, II. § 21. So provided in the Bürgerliches Gesetzbuch, § 322. Conf. Hasenöhr, Oesterreichisches Obligationenrecht, II. 411.

<sup>2</sup> André, 135; O. A. G. Lübeck, 18 June, 1840, Seuff. Arch. IX. No. 216; O. A. G. Darmstadt, 27 Nov. 1866, Seuff. Arch. XXI. No. 222. So in a decision of the Reichsoberhandelsgericht, 17 Jan. 1874, Entsch. XII. 229; Seuff. Arch. XXXI. 219. The plaintiff sold a clothing business to the defendant and contracted not to go into competing business. The action was for an instalment of the contract price of which but a small part had been paid. The defence was that plaintiff had joined a competing firm. The court rejected the plaintiff's suit, saying the agreement not to compete was not collateral but essential to give value to the goods. The defendant could not be compelled to accept damages, as he would be obliged to if the deficiency of the plaintiff's performance could no longer be cured.

<sup>3</sup> André, 136; O. A. G. Darmstadt, 27 Nov. 1866, Seuff. Arch. XXI. No. 222; O. L. G. Braunschweig, 1 May, 1889, Seuff. Arch. XLVI. 358. But see as to right of withdrawing from future performances of an instalment contract, *ante*, p. 97, n. 7.

<sup>4</sup> André, 137. Here again the question of burden of proof comes up. Must the defendant prove how much he may retain or must the plaintiff prove the limitations of the defendant's right? André favors the latter view, p. 137. In an action in the Obertribunal, Berlin, 9 Oct. 1877, Seuff. Arch. XXXIV. 281, the plaintiff sued for rent of a mill leased by him to the defendant for a term of years. The defence was that the mill was in such bad repair that the defendant had been able to do but a part of the work he might have fairly expected to do, and that a meadow forming part of the premises contracted for had not been delivered to him but had been leased to another. The court held that the defendant could not be restricted to a counter claim for damages, and that though plaintiff might fairly be entitled to some rental, yet as the fault was the plaintiff's the defendant could not be compelled to prove how much the plaintiff's breach of contract had lessened the contract price; rather it was the plaintiff's duty to show what amount he was entitled to demand in view of all the circumstances, and if he did not do this his suit must be dismissed. See also R. G. 15 June, 1896, Seuff. Arch. LII. 144, stated, *ante*, p. 96, n. 1.

approaching it. The theory of the defence here, as generally, is based on the supposition that performance is still possible and the defendant's retention is not to be permanent but merely until the plaintiff's performance is completed.<sup>1</sup> The defendant is, however, restricted to a counter claim for damages, when the unfulfilled promise of the plaintiff is collateral to the main object of the contract.<sup>2</sup>

In addition to these limitations of the defendant's right another very comprehensive one has been suggested and sometimes laid down by the courts. It is argued that as the defence is dilatory and has for its object forcing the plaintiff to perform, it is not appropriate where the plaintiff's performance has become impossible, whether with or without his fault. This reasoning is equally applicable whether the plaintiff has partly performed or has done nothing; but the cases where it has been applied have been cases of part performance.<sup>3</sup> André opposes the theory. As he says, if a

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<sup>1</sup> This theory is brought out in a decision of the Reichsgericht, 11 June, 1881, *Entsch. R. G. IV.* 197, also *Seuff. Arch. XXXVII.* 25. The plaintiff sued for the balance unpaid on a building contract. The defendant claimed to retain it because of defects in the work. The contract price was 1606 marks; 675 marks had been paid; the defendant claimed that it would cost about 650 marks to do the work properly. It was held that the defendant was entitled to retain the balance of 931 marks, the difference between this amount and that necessary to complete the contract not being so great as to make it "dolus" for the defendant to exercise the right of retention.

The Bürgerliches Gesetzbuch provides that "if performance has been partially rendered by one side counter performance cannot be refused, in so far as the refusal would offend against good faith under the circumstances—especially because of the comparative insignificance of the portion in arrears." *B. G. § 320.*

See also a decision of the Oberamtsgericht, Wiesbaden, 4 May, 1842, *Seuff. Arch. I.* No. 39.

<sup>2</sup> For instance, breach of promise to repair leased premises will not ordinarily afford ground for non-payment of rent, or for any other right than a counter claim for damages, *O. A. G. Darmstadt*, 27 Nov. 1866, *Seuff. Arch. XXI.* No. 222.

<sup>3</sup> *R. O. II. G.* 31 May, 1879; *Seuff. Arch. XXXVI.* 41. The plaintiff had undertaken to have an advertisement of a lottery inserted in 58 specified Italian newspapers. In some the advertisement was to appear six times, in others four times, in others twice. The defendant agreed to pay 6¼ francs for each insertion, though the advertising rates of the papers differed. The plaintiff's declaration alleged that the advertisement had appeared in but forty papers and of these five refused to repeat it, the refusals to insert or repeat the advertisement being due to the fact that dealing in foreign lottery tickets was contrary to the law of Italy. The plaintiff was allowed to recover on condition of proving the deficiency in performance was not due to her fault, especially as the attainment of the object of the contract did not require insertion in each paper. *O. L. G. Darmstadt*, 4 Feb. 1880; *Seuff. Arch. XXXVIII.* 25. The plaintiff had sold the defendant her entire establishment with its contents, including wine and supplies for an agreed price of 171,428 marks, payable in instalments. This action was for an instalment of 91,428 marks. The defence was that the quantity of wine and supplies was much less



man contracts for the use of a carriage on the first Sunday in August and does not get it, yet is sued for the hire, it is immaterial to him whether the plaintiff would not or could not furnish the carriage.<sup>1</sup> The late decisions of the Reichsgericht, too, have refused to limit in this way the application of the defence even in cases where the plaintiff had performed a large part of what he had agreed.<sup>2</sup> The Bürgerliches Gesetzbuch, however, seems technically to have adopted the limitation. For though the general provision for the defence of unfulfilled contract is broad enough to include cases where the plaintiff's performance is not possible,<sup>3</sup> the later elaborate provisions for cases of impossibility are presumably,

than the inventory had shown. The plaintiff was allowed to recover subject to the defendant's right to recoup damages for the plaintiff's breach of agreement, the court saying "It is a recognized doctrine of the courts that a contracting party who is sued may set up as a defence the plaintiff's partial failure to perform, and is not restricted to a counter claim for damages, but this is always provided that the remaining performance is still possible. The defence is essentially dilatory and can never take a peremptory character."

In a decision of the O. L. G. Hamburg, 21 Feb. 1885; Seuff. Arch. XL. 288, similar language is used and the plaintiff allowed to recover on a building contract, subject to the defendant's recoupment of damages for incomplete work, since the defendant had had the work completed, making completion by the plaintiff impossible.

The same doctrine is applied by the Oberst L. G. f. Bayern, 21 Oct. 1867, Seuff. Arch. XLIII. 153, in an action for a balance of the price of an estate, which proved, contrary to the agreement, subject to an incumbrance.

<sup>1</sup> André, 163.

<sup>2</sup> R. G. 21 Jan. 1887, Seuff. Arch. XLII. 282. The plaintiff and the defendant entered into a contract by which the former sold and the latter bought 200 hundred-weight of wire nails at an agreed price. The plaintiff further agreed not to have a representative travel for trade through the surrounding towns. This action was for the price and the defence was that the plaintiff had allowed an agent to travel through the surrounding towns and had sold nails there. The court refused to allow recovery, holding the stipulation an essential part of the contract, and that the defendant's rights were not restricted to a counter claim for damages. "Though the defence of unfulfilled contract is in its nature dilatory only, yet its effect is peremptory if the seller has by his own wrongful act made it impossible to fulfil the contract. . . . Even if the plaintiff had sent an agent through the forbidden territory only after the defendant was in default in taking the goods contracted for, still the suit should be dismissed, because if the plaintiff wished to require fulfilment she must on her part be ready to fulfil."

R. G. 28 May, 1888, stated by Schall, in Arch. f. Civ. Praxis LXXIII. 429. The plaintiff sued for royalties promised annually for twelve years by the defendant in a contract by which the plaintiff on his part agreed (1) to teach the defendant a secret process (2) to give him an exclusive license under a patent. The plaintiff taught the process, gave the license and received the royalties for some years, but before the expiration of twelve years the patent was declared void and as the defendant refused to pay further royalties, this action was brought. It was held that the plaintiff, though not liable in damages, and though the royalties were payment for something besides the license, could recover nothing, as there was no way to apportion the payments.

<sup>3</sup> § 320.

exclusive.<sup>1</sup> Injustice to the defendant has been avoided as far as possible by enlarging and defining the right of the defendant to treat the contract as dissolved in this class of cases.<sup>2</sup> He is allowed to do so in any case where the plaintiff has not performed at all or where his performance is of no value to the defendant.<sup>3</sup>

The defence of unfulfilled contract is applicable to all bilateral contracts.<sup>4</sup>

A proper offer of performance, though not accepted, excludes the defence of unfulfilled contract.<sup>5</sup> It is customary to distinguish between "verbal" and "real" offers, and it is said that a bare oral offer is insufficient. There are no fixed rules, however, as to what is necessary beyond that. The formality required by the French law for putting in default does not obtain, but the party offering to perform must be so prepared for performance that the other party has but to receive it, and this must be made manifest.<sup>6</sup> It is immaterial whether refusal of the offer is due to wilful default or to impossibility from subjective causes. One who because of illness

<sup>1</sup> §§ 323, 325.

<sup>2</sup> Where there has been no performance the difference between this affirmative right if allowed and the right of the *exceptio non adimpleti contractus*, is that the defendant must prove non-performance in the first case, while the burden is upon the plaintiff in the second. Where there has been part performance a dissolution of the contract involves a return of whatever has been given by either party. In the case of the *exceptio non adimpleti contractus* such a return must be obtained, if at all, by independent proceedings. Besides these differences, the measure of damages in such a case as the first cited in note 3, p. 104, would be different. If the contract were dissolved any recovery would be based on unjust enrichment, not on the contract price.

<sup>3</sup> B. G. §§ 323, 325. See *ante*, p. 98, n. 3.

<sup>4</sup> Dernburg, II. § 21. It is not necessary that the stipulated performances are intended as an equivalent exchange. In *Entsch. R. O. H. G. VIII. 423*, 25 Jan. 1873, the buyer was allowed to retain the price of goods delivered because of the seller's failure to deliver all the goods, though the price was not a lump sum. But in a decision of the O. L. G. Hamburg, 2 Oct. 1891, *Seuff. Arch. XLVII. 257*, the principle was limited. The plaintiff had sold his business to the defendant, the latter agreeing among other things to pay annually for some years 2% of the amount of gross business, and to make statements of the business. The plaintiff sued for one of the promised statements. The defendant set up in defence that certain money was due him on the transaction. It was held that though this would have been a defence if the plaintiff had been suing for the 2%, it was not a defence to the merely "preparatory suit" for the statement.

<sup>5</sup> Because it would be fraudulent to make use of the defence under such circumstances. The offer is technically matter for replication.

<sup>6</sup> The *Bürgerliches Gesetzbuch* lays down some general rules which will become operative in 1900. §§ 284, 293-299. A verbal offer is made sufficient if the other party declares that he will not accept, or if his coöperation is necessary to make the performance effectual, as by calling for and taking goods.



cannot use a room engaged in an inn, one who is prevented from taking a music lesson because of a lame hand, must none the less pay the stipulated price, less any saving made by the other party from being freed from performing.<sup>1</sup>

Preventing performance by the other party has the same effect as refusing to accept proffered performance. Indeed, the boundaries between an unconditional refusal to accept performance, that is, to co-operate in carrying out the contract, and a prevention of performance, are not always definite.<sup>2</sup>

As in the French law, mere receipt of performance does not necessarily imply such an approval of it as will prevent subsequent objection. Defects not apparent on ordinary examination, at least, are not thereby excused.<sup>3</sup> Approval of performance also may indicate not an intention to treat the performance as full compliance with the contract, but merely to accept the performance as a partial or incomplete fulfilment of the contract, with a reservation of the right to demand damages or diminution of the price because of any defects. In the latter case, any right to dissolve the contract, and also the right to set up the *exceptio non adimpleti contractus*, are lost, but not the right to an action or counter claim for damages. In case of doubt André holds that as it is a question of the surrender of rights, the latter interpretation should be put upon the facts.<sup>4</sup>

Where a party to a bilateral contract agrees to perform before the other, there seems to be recognized no general rule that the prospective inability or expressed intent not to perform by the other party excuses performance of the precedent obligation. The Bürgerliches Gesetzbuch provides<sup>5</sup> that the party bound to precedent performance may, if an essential impairment in the circumstances of the other party occurs after the conclusion of the contract, refuse performance unless the counter performance, or se-

<sup>1</sup> André, 141, 144; Bürgerliches Gesetzbuch, § 325.

<sup>2</sup> André, 142.

<sup>3</sup> André, 175. Even defects which would be apparent on examination, it is said, are not excused, if not in fact discovered. Windscheid, II. 446, § 394. But the Handelsgesetzbuch (Art. 347) requires in the case of goods sent from another place, that the buyer shall make prompt examination and give immediate notice of any defects, and in case of failure to do so shall be regarded as having approved the goods, so far as concerns defects which would have been discovered by ordinary examination. Latent defects must be notified to the seller as soon as discovered, or will be regarded as waived. § 377 of the new Handelsgesetzbuch repeats these provisions, and extends them to sales in the same place.

<sup>4</sup> André, 173. See a decision of the Reichsgericht, 12 June, 1885; Seuff. Arch. XLI. 15.

<sup>5</sup> Section 321.

curity for it, is given concurrently. This, however, does not apply when the irresponsible party was irresponsible when the contract was made. And the case of one whose prospective failure to perform is due to other causes than failing circumstances is not covered.<sup>1</sup>

In addition to the right to enforce specific performance, the right to treat a contract as dissolved, the right to damages either in a direct action or counter claim, and the *exceptio non adimpleti contractus*, there is still another remedy in Germany, of occasional application, for breach of contract. This is "Preisminderung," an appropriate diminution of the price or performance to which the party in default would otherwise be entitled by the terms of the contract.<sup>2</sup> In many cases this remedy is equivalent in its results to the ordinary right of the defendant to have any damage to which he is entitled because of the plaintiff's imperfect performance deducted from the contract price. But this is not always so. It may be that the imperfection of the plaintiff's performance was due to an accident for which neither he nor the defendant is responsible, and for which, consequently, the plaintiff is not liable in

<sup>1</sup> The question does not seem to have been discussed. The following decisions show perhaps a tendency to allow prospective inability as a defence.

R. G. 27 Apr. 1892, Seuff. Arch. XLVIII. 441. Plaintiff agreed to buy, defendant to sell, rice flour, to arrive by vessel at Hamburg, payment to be "cash on delivery of the bills of lading." The bills of lading when offered to the plaintiff had written on them, "bag sewings insufficient." The plaintiff refused to accept the bills and sued for damages. It was held that he was entitled to sue. Though he was bound to pay cash before delivery of the goods, and could not claim to hold the price till they were proved good, but must pay, and if they were bad sue to recover what he had paid, yet the bills of lading must at least give him the expectation that the goods were conformable to contract. R. G. 22 Apr. 1893, Seuff. Arch. XLIX. 191. In case of a similar contract, the goods had arrived at the time the bills of lading were offered. It was held that the buyer was entitled to examine the goods before making payment, and reject them if of defective quality.

A party who has acquired a right of action on a contract may lose his right by his own subsequent breach of contract.

In R. G. 15 June, 1896, Seuff. Arch. LII. 144 (stated *ante*, p. 96, n. 1.), impossibility of performance by the defendant was held to excuse performance by the plaintiff, though at the time when the plaintiff's performance was due, the defendant's performance was continuing and had not become impossible. See also R. G. 21 Jan. 1887, Seuff. Arch. XLII. 282 (stated *ante*, p. 105, n. 2).

<sup>2</sup> This is derived from the *actio aestimatoria* or *quantum minoris* of the Roman law. In contracts of sale, at least, it was an alternative remedy to the *actio empti* and the *actio redhibitoria*. Hunter, Roman Law, 505; Salkowski, Roman Law, 602; Moyle, Sale in Civil Law, 194, 210-212. The remedy exists in France, Code Civ. Art. 1644, Aubry-Rau, IV. 389, 392, and presumably in other countries whose law is derived from Roman sources, see *e. g.* McVeigh v. Lussier, 13 Lower Canada Rep. 265, but seems of wider and more frequent application in Germany than elsewhere. It does not exist in Austria, see *post*, p. 109, n. 5.



damages; yet the defendant ought not to be compelled to pay the full price.<sup>1</sup> A second case is where the imperfection of the plaintiff's performance, though wrongful, has not caused the defendant any damage.<sup>2</sup> Further, loss of profits which the defendant would have gained, though an element of damage, is not considered in this remedy.<sup>3</sup>

In Austria the same general principles prevail, for the most part, as in Germany. The right of treating a contract as dissolved because of default of performance of the other party is confined to cases covered by the *Handelsgesetzbuch* and a few special cases,<sup>4</sup> and the rights of an injured party are therefore generally limited to specific performance, damages, or the *exceptio non adimpleti contractus*.<sup>5</sup> The rules in regard to these are drawn from German authorities.

Samuel Williston.

<sup>1</sup> Bürg. Gesetzbuch, §§ 323 *et seq.*

<sup>2</sup> An interesting illustration of this is found in a decision of the Reichsoberhandelsgericht, 6 June, 1877, Seuff. Arch. XXXIV. 426. The defendant hired a steamer of the plaintiff for the purpose of carrying passengers to see the manœuvres of the German navy on a certain day. The plaintiff warranted that two hundred passengers could sit on the deck, allowing ten square feet for each. The defendant agreed to pay eight hundred marks. The action was for this price, the defence that there was deck room for but one hundred and twenty-five passengers, and that the defendant was therefore liable for but  $\frac{2}{3}$  of the price. The plaintiff's reply to this was that the deficiency had caused the defendant no damage (apparently because he had been unable to sell even one hundred and twenty-five tickets to the boat), and the defendant admitted this. The Imperial Court held that the defendant was liable for but five hundred marks. If he had chosen, he could have refused the steamer altogether and relied on the *exceptio non adimpleti contractus*; but he might take the steamer, and as the plaintiff had warranted a particular quality which had a direct relation to the price fixed, the latter was not entitled to that price unless the quality existed. The defendant is no more guilty of bad faith in seeking to have the price reduced when the deficiency caused him no damage than the plaintiff would be in demanding the contract price if the defendant had been unable to use the steamer.

Another illustration is found in a decision of the Oberamtsgericht, Kiel, 29 Dec. 1860; Seuff. Arch. XIV. No. 129. The plaintiff sued for the price of twenty chests of tea sold to the defendant, and which the defendant had resold at a profit immediately. The defendant set up that the plaintiff had taken out of the chests some tea and that there was less remaining than had been agreed. The plaintiff urged that while this might justify the defendant in refusing to pay until he had received additional tea, or in rescinding the bargain, it could not justify a judgment for a diminished price, the bargain having been profitable to him. But the court in giving such a judgment, observed that the defendant was not seeking damages.

<sup>3</sup> R. G. 2 Apr. 1898, Entsch. R. G. XLI. 163.

<sup>4</sup> Hasenöhr, Oesterreichisches Obligationenrecht, II. 338. But by the Austrian law, unlike the Roman law and German law, damages are at least in some cases allowed as an additional remedy to the dissolution of the contract. *Ibid.* II. 474.

<sup>5</sup> Hasenöhr, II. 400-416, § 89. The Austrian law does not recognize the remedy of diminution of the price (*actio quanti minoris*). *Ibid.* II. 477, note 89.

## NULLITY OF MARRIAGE.

WHETHER marriage is looked upon as a contract or as an institution or as a status, it is perhaps the most important of all conditions in civilized communities. It is created by the contract of the parties, and continues during their joint lives. But from the time the marriage ceremony is performed they have no power by mutual consent to dissolve it. From that time the public alone by legislative act or judicial decree can put an end to it. Public interest and public morality alike demand that we shall never permit any loosening of the marriage tie, save in extreme cases when grievous wrong is done to innocent persons. It is of the gravest public concern that the marriage should be permanent. That the origin of such concern is traceable to the teachings of the Church is important only as it serves to impress upon the people of the community the necessity of such permanence.

The parties to a marriage take each other for better or worse. Neither can complain if the other becomes mentally or physically affected or incapacitated. Again, from the moment the marriage is entered into, the parties are disqualified from contracting with each other, and this disqualification lasts as long as the marriage continues. The property rights of the parties become fixed by the marriage. The husband acquires rights in the wife's estate, real and personal, and she in his. Their rights to make effective wills are abridged. While these property rights may be affected in whole or in part by mutual consent they serve to illustrate the change which marriage works in the condition of the parties. Again, the parties acquire legal relations toward each other. Among these may be mentioned the right of the husband to the services of his wife, the right of the wife to be supported by the husband. These rights and duties arise from the necessity of the case. The public interests require that such should be the accompaniments of the conditions in which the parties are placed by marriage.

But there is an overwhelming reason why the community should not permit married persons to change their legal status. National, state, and local rights and duties are created by marriage. The



public, that is to say, the sovereign nation or state, in emergencies, has the right to the services and even to the lives of its citizens. It has a solicitous care for them. It provides for their education, health, needs, and comfort. Burdens of weight are imposed upon communities. Therefore the public comprising the nation, state, or municipality, as the case may be, has such an interest in the offspring of marriage as to give it the right to say that the conditions created by the marriage shall not be changed save by its consent.

Acts of legislatures and judgments of courts abound in evidences of the zealous care which the public exercises over children.<sup>1</sup> They belong no less to the public than to the parent. It has ever been slow to give consent to any change in the marriage condition, and always has insisted upon the strongest reasons before allowing the parties to alter the situation in which they are placed when they marry.

Sound public policy furnishes us the true guide in determining what shall be a sufficient reason for dissolving marriage. Unfortunately cases arise where a continuance of the marriage relation would be a positive injury to the public as well as to the private interest. Wrongs offending the moral sense of the community are repeated until these come to be recognized as well defined grounds for dissolution of marriage. While it is for the legislature to prescribe what shall be sufficient grounds, the courts in rare instances say what in addition to the legislative grounds may suffice to dissolve marriage.

Divorce is the ordinary way of terminating the marriage condition. The grounds are few, and with the exception of a limited number allowed in a very few of our states, beyond criticism. The ease with which divorces are obtained in some states is to be explained in great measure by the looseness of the procedure. In such states it generally will be found that no provision is made whereby the honesty of the proceedings is guarded. There is no department in the administration of the law where there is more danger of deception being practised upon the court. The temptation is almost irresistible for the parties where married life has become to them well-nigh insupportable, to exaggerate, if nothing more, in their testimony. When the suit is contested there is

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<sup>1</sup> See *Park v. Barron*, 20 Ga. 702, where the court went very far to save the legitimacy of children.

some safeguard for the public interests. But when there is no trial between the parties — when the suit is uncontested — the situation is peculiarly adapted to lead the libellant to testify to enough to procure the divorce. There is no check. The Court knows, and can know, nothing of the parties or the circumstances of the case, except what is disclosed at the hearing. Many judges feel at times that possibly they are imposed upon to a greater or less extent, and make strenuous efforts to get at the real situation. But the procedure in divorce is inadequate. It is strange that in a matter where the public has so great interest there should be no safeguards provided.

Cases occur where divorce will not give a sufficient remedy for the wrong done. These cases demand a more radical treatment. The injury is such as to require an annulment, that is, an entire destruction of the marriage *ab initio*. It will be seen at once that the effects of annulling a marriage are far more serious than the results of divorcing the parties. The decree of divorce presupposes a legal marriage. The decree, or sentence, of nullity says that there was no marriage. If the public has a great interest in divorce, how deep is its concern in nullity.

It is not surprising, therefore, that legislatures and courts have been slow to administer this remedy and have restricted the grounds for nullity so that they are very few in number. The personal relations and the property rights of the parties are entirely changed by a decree of nullity. But the gravest effect of such decree is that it renders children illegitimate. Legislatures have provided for the legitimacy of children and have furnished a remedy for some of the evils arising from the decree. But long before the enactment of such provisions the decrees of nullity were followed by all their harsh consequences.

In order to examine properly the grounds and reasons which compel the courts to grant the decrees we should keep in mind the distinction between void and voidable marriages. This distinction has been well defined as follows: —

“The difference between void and voidable is so clear that no person who ever looked into any elementary book on the subject is ignorant of it. The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence is actually declared during the lifetime of the parties. Civil disabili-



ties such as prior marriage, want of age, idiocy, and the like, make the contract void *ab initio*—not merely voidable: these do not dissolve a contract already made, but they render the parties incapable of contracting at all: they do not put asunder those who are joined together but they previously hinder the junction; and if any person under these legal incapacities come together, it is a meretricious, and not a matrimonial union; and therefore no sentence of avoidance is necessary.”<sup>1</sup>

This distinction has sometimes been lost sight of, with resulting confusion.

A voidable marriage is valid until avoided by a decree obtained at the suit of one of the parties thereto, and consequently cannot be attacked in collateral proceedings.<sup>2</sup> A void marriage is invalid *ab initio*. No decree is necessary to establish the invalidity.<sup>3</sup> It may be disputed in any proceedings, direct or indirect. The legal situation in the case of a void marriage is therefore plain and needs no further comment.

But perplexing questions arise in suits for the annulment of voidable marriages. Causes well recognized by the law are consanguinity, affinity, impotence, and want of consent, including mistake as to persons, duress, and fraud. The two latter, especially fraud, in their very nature are calculated to cause difficulty and confusion. The marriage condition is created by the voluntary consent of the parties. Without such consent there is no marriage. It follows then that where consent is obtained by duress or fraud the party may have relief if he takes prompt action on being free from the constraint or after discovering the fraud. It is manifestly against public policy that relief should be given if the parties after the duress has ceased or after the fraud has been discovered voluntarily continue cohabitation. In such case they acquiesce in or ratify the wrong. The law as to duress can now be considered as settled, and we may therefore confine our attention to the subject of fraud.

To define the kind of fraud which will lead the courts to relieve the innocent party is a matter of some difficulty. When the causes were tried in the ecclesiastical courts in which the jurisdiction was originally vested, there was little confusion. But

<sup>1</sup> Elliott v. Gurr, 2 Phillim. 16.

<sup>2</sup> See Ridgely v. Ridgely, 79 Md. 298; McKinney v. Clarke, 2 Swan, 321.

<sup>3</sup> Although a decree of nullity in a case of void marriage is unnecessary, yet the courts many times are asked to grant such decrees. It is wise to take such proceedings when both parties are living and when evidence is easily obtainable. The decree is a matter of record and conclusively establishes the invalidity of the marriage.

when the temporal courts undertook to deal with the subject of nullity they were troubled. Fraud was a well-known—a traditional—ground for relief in equity. In some of our States the equity courts assumed jurisdiction on that ground.<sup>1</sup> It is believed that no common law court ever undertook to grant nullity of marriage; although courts at law in dealing with actions recognized fraud as an important element. In England since 1857 jurisdiction over dissolution of marriage has been in the courts provided by acts of Parliament. In this country, although the courts of some states assumed jurisdiction in equity, jurisdiction has generally been conferred by the legislatures. But whether jurisdiction was conferred or assumed the courts have had to define the kind of fraud which would suffice to annul the marriage. Instinctively they sought something which would accord with the methods of reasoning they had been accustomed to adopt. The English courts, succeeding the ecclesiastical courts, followed closely the ecclesiastical decrees. But whether by force of legal habit or whether from some other cause, the court in its reasoning in a case<sup>2</sup> which arose some years ago treated marriage as if it were an ordinary contract. The case will be referred to hereafter.

A passage from Ayliffe's *Parergon* seems to have been considered so late as 1897<sup>3</sup> as a reliable statement of the ecclesiastical law. It is as follows:

"Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void *ipso jure*; . . . for marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences. . . . And though there is nothing more contrary to consent than error, yet every error does not exclude consent. Wherefore I shall here consider what kind of error it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void *ab initio*.

"Now there are four species of error, which are hereunto referred. The first is styled *error personae*, as when I have thoughts of marrying Ursula; yet by my mistake of the person I have married Isabella. For an error

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<sup>1</sup> *Wightman v. Wightman*, 4 Johns. Ch. 343; *Burtis v. Burtis*, Hopk. 557; *Carris v. Carris*, 9 C. E. Green, 516; *Henneger v. Lomas*, 145 Ind. 287. *Contra*, *Mattison v. Mattison*, 1 Strobh. Eq. 387.

<sup>2</sup> *Scott v. Sebright*, 12 P. D. 21.

<sup>3</sup> *Moss v. Moss*, [1897] P. 263.



of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting. For deceit is oftentimes wont to intervene in this case; which ought not to be of any advantage to the person contracting. A second species is styled an error of condition.<sup>1</sup> . . .

"The third species is what we call *error fortunæ*; and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. . . . The last species is stiled an error of quality, viz., when a person is mistaken in respect of the others quality, with whom he or she contracts. As when a man marries Berta believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflowered or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deemed to be simply voluntary as to the nature and substance of it, though in respect of the accidents 't is not voluntary."

From this it will be seen that the effect of deceit or fraud in nullity of marriage is far more limited than in the case of ordinary contracts. The language of Butt, President, in *Scott v. Sebright*<sup>2</sup> seems to indicate that the same rule of law applies in both cases. This was a petition for nullity of marriage on the ground of duress and false representations. The language is as follows: —

"The courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract.

This statement might well have been accepted as an authority for treating fraud in nullity suits as in ordinary actions at law, if it had not been commented on and explained in the later case of *Moss v. Moss*,<sup>3</sup> where the President said of the language above quoted:

"Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant. But read in connection with the facts before the court, which showed a case of deception and force acting on a weakened mind, they

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<sup>1</sup> Recognized by Ayliffe as obsolete.

<sup>2</sup> 12 P. D. at p. 23.

<sup>3</sup> [1897] P. at p. 271.

do not appear to me to go further than to lay down that in the case of marriage, as in the case of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all.

So that the language of the court in *Scott v. Sebright* is now to be understood as simply declaring that if the nature of the fraud is sufficient to satisfy the requirements of the divorce courts, it will lead them to declare a marriage null in the same way in which fraud will lead the courts to declare a contract void.

But what is the nature of the fraud which will lead the divorce courts to such action? Will they interfere when the fraud is based upon representations as to moral qualities or physical conditions? The English courts, in the case of *Moss v. Moss*,<sup>1</sup> have declined so to do. This was a petition for nullity of marriage on the ground of fraud. The respondent, at the time of her marriage with the petitioner, was pregnant by another man, and concealed her condition from the petitioner, who, on discovering her condition, ceased all relations with her. The court dismissed the petition. The President, Sir Francis H. Jeune, delivered the opinion of the Court. He said, in part:—

“In the case of *Swift v. Kelly*,<sup>2</sup> decided in 1835, the Judicial Committee of the Privy Council Lord Brougham, Baron Parke, and Shadwell, V.-C., being members of the Board, expressed its opinion in the following terms: ‘It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made.’ It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words, unqualified as they are, do represent with substantial accuracy the law of England;. . . Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has consented to it to rescind it. . . .

“The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. . . .

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<sup>1</sup> [1897] P. 263.

<sup>2</sup> 3 Knapp, 257 at 293.



It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down in *Fulwood's Case*,<sup>1</sup> that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. . . . The principles thus long and uniformly asserted by the English courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shown that authority to the contrary could be found in the canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the canon law. . . .

"The decisions in the American courts on which the learned counsel for the petitioner places his main reliance do no doubt cover the present case, and the more important of them are, I think, decisions professing to be based on the same principles that we recognized. Speaking with all respect, these courts have, in my opinion, introduced a novelty into the law common to the two countries, and have broken in on the principle that the only fraud which annuls a marriage is that which renders the mind of one of the parties not a truly consenting mind. They repudiate equally with English tribunals the idea that any other fraudulent representation vitiates a marriage; but they lay down that there is one fraudulent representation, or fraudulent concealment which renders a marriage void, and that is the representation or concealment by which a woman induces one man to marry her when she is pregnant by another."

He then examined the decisions of some of our courts, and said prophetically: —

"I refer to these cases chiefly to show that it has been felt that even the comparatively narrow principle that a marriage is voidable by pregnancy of the wife at the time of it by a man other than her husband must receive still further limitations. I venture to think that such limitations could not stop at the point indicated by the above decisions. What would be said if the husband did not become aware of his wife's pregnancy at marriage for a long time after it, and perhaps after the birth of legitimate children, as well might happen if a sailor left his wife for a voyage soon after marriage, and before his return there was a miscarriage

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<sup>1</sup> (1638) Cro. Car. 482, 488, 493.

or the child died? Could he many years after annul the marriage? It is difficult to see why not, if he had no means previously of discovering the truth. Could he bastardize his children? It is also difficult to see why not, unless some further refinement be introduced into the law. My belief is, that to assent to the proposition for which the petitioner contends would be to introduce into a law which now is, and beyond question should be, and be believed to be, certain, a new principle not resting on any sound basis, and, develop as it must in several directions, sure to give rise to many doubts and much confusion."

It can then be said that the rule in England is that no representations as to moral qualities or as to physical conditions are deemed to be material.

The rule in this country is somewhat different. While there must be the substance of consent, the courts have extended the rule as to fraudulent representations so as to include some of those which concern the physical conditions of the parties to the marriage. The leading case is *Reynolds v. Reynolds*.<sup>1</sup> The libel, which was for nullity, set forth that the libellee before marriage falsely represented that she was chaste and virtuous; that she was not virtuous, but at the time of the marriage was pregnant by another man; that at the time of the marriage he was ignorant of her condition, and that he ceased all intercourse with her after discovering her condition. The libellee demurred. The Court overruled the demurrer. The opinion was by Bigelow, C. J., who treated the subject of fraud as applicable to marriage at some length. The opinion dealt with marriage as a contract, but one to be construed with due regard to a wise and sound policy, and stated that the great object of marriage is to secure permanence of family relations and legitimacy of offspring; that fraudulent representations concerning the moral character, personal condition, fortune, health, or temper afford no ground for relief after the marriage is entered into; that such matters are not essential or material to the contract; that the parties are put upon reasonable inquiry as to such qualities; that while such representations would furnish good grounds for refusing to enforce the executory contract, they would not be deemed sufficient to affect the contract of marriage when executed; that the condition of pregnancy by another man is material and sufficient, for it prevents the woman from making or executing the contract of marriage; that although the man is put on

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<sup>1</sup> 3 Allen, 605.



his inquiry as to the woman's qualities above mentioned he is bound to inquire as to whether she is pregnant, for such condition "cannot be ascertained by any of the ordinary means of personal intercourse, or by careful and diligent inquiry;" that as the husband is presumed to be the father of children born after the marriage, in case the marriage be not decreed void, he would be burdened with offspring not his own, or if he chose to rebut the presumption by legal proceedings, he would be forced to make public the shame of his wife, and thereby disturb the harmony of the domestic relations.

Touching the reason advanced by the Court to the effect that the woman while pregnant is incapacitated from making and executing the contract, it may be said that plainly pregnancy does not prevent her making the contract,—and here the learned Chief Justice seems for the moment to have lost sight of the important distinction between the executory contract to marry and the executed contract of marriage, — and that while it may be that she is not at the time capable of executing the contract,<sup>1</sup> the disability is but temporary. A mere temporary disability arising from disease or other cause is not sufficient to annul a marriage. And so far as a person being put on his inquiry is urged as a reason, it would seem to apply in the case of pregnancy as well as in the case of unchastity. Again, when the Court urges the reason that there is a presumption of law that a child born during coverture is the child of the father, the answer is obvious, — indeed, it is anticipated by the Court, — such presumption may be rebutted by the same evidence which will suffice to establish the grounds for nullity. So when the feelings of the parties are considered, the shame and mortification will be equally great whether the proceeding is to annul the marriage or to rebut the presumption of paternity.

But it is harsh indeed to insist that the husband shall accept the paternity of the child or publish the shame of his wife to the world, and at the same time to require that the marriage condition shall continue. Such a course would in all likelihood be disastrous to the relations between the husband and the wife. In this the public is concerned.

As the grounds of the decision in *Reynolds v. Reynolds* are examined, it will be found that they rest upon considerations of sound public policy which are difficult to answer.

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<sup>1</sup> In *Franke v. Franke*, (Cal. 1892), 31 Pac. Rep. 571, it was held that pregnancy did not constitute physical incapacity.

*Carris v. Carris*<sup>1</sup> was a nullity suit. The grounds were similar to those in *Reynolds v. Reynolds*.<sup>2</sup> Bedle, J., gave the opinion of the Court. He said in part:

"This is a delicate question, for the relation is peculiar, and not like other contracts, which may be dissolved by the mere act of the parties. Most serious considerations of public policy and good morals affect it, and demand that it should be indissoluble, except for the gravest causes. The mere presence of fraud in the contract is not sufficient to dissolve it. The fraud must exist alone in the common law essentials of it, and then not to have the effect of avoiding it against sound considerations of public policy. . . . In granting relief, courts should always be careful that no violence is done to the nature of the relation and to sound morals. It must be extraordinary fraud alone that will justify an avoidance of the bond. The fraud charged in this case is extraordinary, peculiar, and of the most flagrant character, entering into the very essence of the contract. . . ."

These cases suffice to show that the true reason for the interference of the Court is based not upon fraud as between the parties, but upon conditions affecting the public. It is not always entirely safe to make use of analogy. However, it may be remembered that private contracts will not be enforced where the consideration is the commission of or refraining from committing or a promise to commit or to refrain from committing a crime or tort. For a promise to commit or the commission of a crime or tort tends to bring about conditions detrimental to the public welfare.

The decisions in this country are generally in accord with *Reynolds v. Reynolds*.<sup>3</sup>

The rule once established that fraudulent representations concerning the physical condition of the party may furnish sufficient ground for nullity, it was inevitable that in time the courts would

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<sup>1</sup> 9 C. E. Green, 516.

<sup>2</sup> 3 Allen, 605.

<sup>3</sup> *Barden v. Barden*, 3 Dev. 548; *Morris v. Morris*, Wright (Oh.), 630; *Scott v. Shufeldt*, 5 Paige, 43; *Ritter v. Ritter*, 5 Blackf. 81; *Baker v. Baker*, 13 Cal. 87; *Carris v. Carris*, 9 C. E. Green, 516; *Sissung v. Sissung*, 65 Mich. 168; *Harrison v. Harrison*, 94 Mich. 559; *Caton v. Caton*, 6 Mackey, 309. *Contra*, *Scroggins v. Scroggins*, 3 Dev. 535.

In *Foss v. Foss*, 12 Allen, 26, the libellant had had intercourse with the libellee before the marriage. The libellee was pregnant by another man. Nullity was refused. Bigelow, C. J., said the libellant had reasonable notice. Considerations of public morality governed the case. *Crehore v. Crehore*, 97 Mass. 330, follows *Foss v. Foss*. See *Franke v. Franke* (Cal.), 31 Pac. Rep. 571.



be asked to extend the application of the rule.<sup>1</sup> In *Smith v. Smith*,<sup>2</sup> the libellee was afflicted with a venereal disease which was probably incurable. The court held that the fraudulent concealment of the existence of the disease was sufficient to annul the marriage. The court, however, showed great reluctance in extending the application of the rule established by *Reynolds v. Reynolds*. Knowlton, J., in the course of an able and careful opinion pointed out with great clearness the distinction between the rights of the parties arising from an executory contract to marry and the status created by the executed contract of marriage, and the difference between the kind and degree of fraud in either case necessary to make the contract voidable. The fact that the libellee was in such condition as to be utterly unfit for matrimony, and the hardship of continuing the marriage relations were treated as of consequence. The binding authority of *Reynolds v. Reynolds* was recognized. But considerations of public policy were plainly felt to be the controlling reasons for the conclusion reached.

It is plain that the court did not intend to lay down any general rule with reference to cases of fraudulent representations concerning physical condition. Yet it is more than likely that cases will arise in which the courts will be asked to annul marriage on grounds similar to those in *Smith v. Smith*. Leprosy certainly renders one unfit for matrimony. It is well known that persons afflicted with this disease are separated from their fellow men. There are forms of tuberculosis which render a person unfit for matrimony, which are infectious, dangerous, and incurable and which are transmitted to offspring. They are of as serious character as the disease in *Smith v. Smith*.

In that case stress was laid upon the fact that the marriage had not been consummated. Bishop in his exhaustive treatise on Marriage, Divorce, and Separation repeatedly calls attention to the legal effect of consummation of marriage.<sup>3</sup> But should it prevent annulment in all cases? Non-consummation is not a ground for dissolution of marriage. *Consensus, non concubitus facit matrimonium*. The rights and burdens of the parties, of third persons, and of the community are fixed when the marriage ceremony is

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<sup>1</sup> In *Ryder v. Ryder*, 66 Vt. 158, and *Anon.*, 49 N. Y. Supp. 331, the libellees were afflicted with chronic and contagious venereal diseases. Nullity was decreed in each case.

<sup>2</sup> 171 Mass. 404.

<sup>3</sup> Secs. 316, 331-364, 456-464.

performed. It is true that the courts in some cases have said that consummation would be a bar to nullity.<sup>1</sup> But an examination of the cases will show the true rule of the decisions to be that where the consummation has occurred after the injured party has discovered the fraud or wrong,—that is, when there has been an acquiescence or ratification,—or when there is a possibility of children, the decree will be denied. Plainly acquiescence and ratification should have this effect. The possibility of offspring is the strongest reason for refusing annulment. But in cases in which this possibility ceases to exist, the American rule as to fraudulent representations concerning physical condition may safely be applied. If one of the parties after consummation of the marriage discovers the fraud, and thereupon separates from the other for a length of time sufficient to determine that there will be no child born of the marriage, is it for the public interest to say that the marriage condition shall continue?<sup>2</sup> It is difficult to see how the public will be affected injuriously by annulment in such case.

With the exception of fraud the legal grounds for dissolution of marriage give little reason to apprehend any serious danger to the permanency of the marriage status. As before stated, the causes for divorce and nullity are few and, saving fraud, sufficiently defined. When fraud is the ground for annulment, the danger to be feared is that the American rule may be unduly extended.<sup>3</sup> If, however, it is carefully applied, the public interests will be helped rather than harmed.

When we compare the English and American rules with reference to fraud it will be seen that both have advantages and disadvantages. The English rule is simple, readily understood, and easily applied. But in some cases it works hardship.<sup>4</sup> The

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<sup>1</sup> *Lyndon v. Lyndon*, 69 Ill. 43; *Robertson v. Cole*, 12 Tex. 356. In these cases the libellants were 15 years of age. They were enticed away and persuaded by means of fraudulent representations to go through the form of marriage, and were returned to their parents directly after the ceremony. The marriage was repudiated immediately. Consummation would clearly have operated as acquiescence or ratification.

<sup>2</sup> See *Ryder v. Ryder*, 66 Vt. 158, and *Anon.*, 49 N. Y. Supp. 331.

<sup>3</sup> In *Ryder v. Ryder*, 66 Vt. 158, the parties cohabited for more than a year after the libellee discovered the libellee's condition. This case goes to the danger point, if not beyond.

<sup>4</sup> Sir Francis H. Jeune in *Moss v. Moss*, [1897] P. p. 278, at the close of his opinion said: "I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed."



American rule is not so simple, and is difficult of application. But it has the great advantage of affording relief in cases of exceeding hardship. With great care in its application no harm should come to the public interests. The courts having watch over the public as well as the private welfare will, it is confidently believed, refuse to extend the rule so as to endanger permanence of marriage.

*Franklin G. Fessenden.*

GREENFIELD, MASS.

May 1, 1899.

THE PENAL CODE OF CUBA AND  
PORTO RICO.<sup>1</sup>

FOR the fourth time since its foundation, the Republic finds a Spanish penal code the existing law of a part of its territory. Louisiana (although ceded by France) brought with it the Spanish law, in force since 1769; and barely had the problems arising out of its incorporation into our jurisprudence been solved, when the successive acquisition of Florida, California, and New Mexico created others. Among the ugliest was the existence in these territories of a penal code repugnant to the principles of our law. We now have another such code to amend or annul as one of the first duties of constructive government, at least so far as it concerns the Island of Porto Rico.

The Act of Congress (March 19, 1804) creating a territorial government for Orleans territory, now Louisiana, declared that the inhabitants should be entitled to the writ of habeas corpus, trial by jury, bail, except in certain capital cases, and immunity from cruel and unusual punishments. With these modifications it left the Spanish criminal law to be dealt with by the territorial government, which wholly abolished it, while retaining the civil code, and substituted for it an act, defining crimes and misdemeanors, providing for certain privileges to accused persons, such as the right of inspecting indictments, examining jurors, consulting with counsel, public trial and sentence, etc. It concluded thus: "All the crimes, offences, and misdemeanors hereinbefore named" (or non-enumerated) "shall be taken, intended, and construed, according to and in conformity with the Common Law of England, and that the forms of indictment (divested of unnecessary prolixity), the method of trial, the rules of evidence, and the prosecution of said crimes, offences, and misdemeanors, charging what ought to be charged, shall be, except as is by this Act otherwise provided for, according to said common law."<sup>2</sup>

<sup>1</sup> Código Penal para las Islas de Cuba y Puerto Rico, promulgated by Real Decreto of May 23, 1879, being a revision of the Penal Code of June 17, 1870.

<sup>2</sup> Acts Leg. Council, Orleans Terr., First Session, Ch. L., Sec. 33.



The Act of Congress for the administration of Florida (March 30, 1822) followed the Louisiana precedent; and as the territory had no considerable Spanish population, the Legislative Council, by one enactment, abolished all Spanish law in force and replaced it by the Common Law of England,<sup>1</sup> with a proviso "that none of the British statutes respecting crimes and punishments shall be in force in this Territory." A further Act (September 17th, 1822) accordingly defined crimes and their punishments after our humane principles of penology.

So successful were these two experiments, that when we were at war with Mexico, and in military occupation of its territory, Brig.-Gen. S. W. Kearny, commanding at Santa Fe, New Mexico, put in force by military order (September 22, 1846) a code of law still known by his name, that superseded the existing criminal code by a concise law of twenty-seven sections.<sup>2</sup>

Whether the penal code of Porto Rico is modified or abolished by military order, Act of Congress, or the law of a territorial legislature yet to be created, its continuance is a matter demanding early consideration by the proper authorities.

This Code was a revision of that of 1870, undertaken upon the conclusion of the "Ten Years' War" in Cuba, by the illusive "Peace of Zanjón" (1878). The revisers admit in their prefatory address that they had not been able to agree on any quasi-political reforms, and that they had confined themselves to clarifying the Code, and making it, as nearly as possible, identical with that of the Peninsula.

The Code's political intent, thus unchanged, is perhaps the first thing that impresses the American reader, familiar with this simple clause (Art. III., Sec. 3) in our constitution, — "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort" — and the almost equally brief statutory provisions regarding kindred offenses. The Code recalls all the turbulent history of modern Spain, by its manifest design to keep down further revolutions by penalizing specific acts committed in revolutions past, especially by public servants. So, we have a chapter on the crime of "treason" (Book II., Title I., Ch. I.); another on "crimes that endanger the peace or independence of the State" (*Ib.*, Ch. II.); and others on "lèse-majesté" on "crimes against the Cortes and its members;"

<sup>1</sup> Leg. Council of Florida Territory, First Session, Act of September 2nd, 1822.

<sup>2</sup> "The Kearny Code," printed in Compiled Laws, New Mex., 1897.

"against the Council of Ministers;" "against the form of Government" (*Ib.*, Title II., Ch. I.); on "crimes committed by individuals or public functionaries, on the occasion of, or against the exercise of, individual rights guaranteed by the Constitution," or "in violation of the constitutional provisions relating to religion and worship" (*Ib.*, Ch. II.); on "rebellion" (*Ib.*, Title III., Ch. I.); "sedition" (*Ib.*, Ch. II.); and lastly, on "criminal attempts against authority and its officers, resistance and disobedience," "acts of disrespect, insults, outrages, and threats against authority, its officers, and other public functionaries," and "public disorders" (*Ib.*, Chs. III.-VI.). This portion of the Code comprises one hundred and thirty-three out of four hundred and fifty-nine articles devoted to crimes and their penalties, or almost one-third of the book.

One deduces from this that the Spanish monarchy relies on force for its continuance, since the Code penalizes acts that the patriotic love of a free people would make impossible. For instance, the individual Spaniard is guilty of treason, punishable by chains or death, "who shall induce a foreign power to declare war on Spain" (Art. 134), or "facilitate the enemy's entrance into the kingdom," or "seduce Spanish troops . . . to go over to the enemy's ranks," or "recruit people in Spain to make war upon the country under the flag of an enemy power" (Art. 135); or "who shall take up arms against his country under an enemy's flag" (Art. 136). Public authorities are forbidden to disobey the Regency "in case there should be a vacancy of the Crown" (Art. 163); or to substitute "for the monarchical-constitutional government an absolute-monarchical government or republican government," or to change "the lawful succession to the Crown" (Art. 169), or to publish "bulls, briefs, or dispatches from the Holy See," or "any proclamation, order, or document emanating from a foreign government, that attacks the independence or security of the State" (Arts. 142-3). One might indefinitely multiply such examples — reminiscent of pronunciamientos, barrack-uprisings, and Carlist plottings. To more complete the melancholy picture: Article 114 permits convicts to be assigned to military service; and Articles 435 and 436 punish with imprisonment those who, in order to escape conscription, mutilate themselves or their relatives.

Of course these purely political provisions relating to the Crown and Government of Spain fell with the treaty of cession and have become mere historical curiosities, like the fateful clause that pun-



ished with death as rebels all "who rise with public and overt hostility" "to proclaim the independence of the islands of Cuba and Porto Rico, or either of them" (Art. 237). Nevertheless, woven in with provisions now manifestly obsolete are others that might still be made extremely mischievous.

For instance, "open air meetings or political demonstrations held by night," whatever their object, remain criminal (Art. 177), as do meetings held without twenty-four hours' prior notice to the authorities, or not dissolved on their second command to do so (Arts. 178, 183). Associations whose promoters do not eight days before they are formed furnish the authorities their by-laws, and thereafter give twenty-four hours' notice of each meeting and allow the authorities to be present thereat, and say whether it may proceed or no, are likewise under the ban (Art. 187), along with "authors, directors, editors, or printers" of publications not bearing the printer's name, or not complying with the press law (Art. 191). Ministers of other than the State (Catholic) religion are punished if they celebrate their worship "outside the precincts set apart" for them (Art. 228), while offence "by word or gesture" against a minister of the State church may be punished by heavier penalties than physical assault upon one of any other religion (Arts. 229, 234). "To act in contempt of, or with insult towards the public authorities" "aggravates criminal responsibility" (Art. 10, Sec. 17). Like aggravations are "to commit the crime . . . where public authority may be exercising its functions," or "with insult or in contempt of the respect to which the aggrieved person was entitled because of rank," or "by the use of weapons prohibited by the regulations," *e. g.*, a machete with a hilt (*Ib.*, Sections 20, 21, 26). "To outrage, insult or threaten, by act or word, public functionaries, or officers of the authorities, in their presence or by writing to them directly" is a crime in itself (Art. 266).

The Code has another class of obsolete provisions that will strike the American reader as equally curious. These are the articles relating to slavery, which consists of one whole chapter (Book II., Title XIII., Ch. III.), and some twenty articles directly using the word "slave," still unrepealed, although slavery ceased in 1886. To strike them out would accomplish no more, however, than to strike out the political provisions just referred to; for while both are dead in the letter, their spirit animates others not in terms related to them, as, for instance, the one declaring that

it is an aggravation of crime "for one not a white man to commit the deed against a white man" (Art. 10, Sec. 22), a principle that we have not yet, at least, sunk so low as to enact in statute law and one which should not be tolerated in practice where the maintenance of law and order is within the power of the Federal authority.

Coming to a consideration of that portion of the Code which is still living, the most radical difference between Spanish law and ours would seem to be that the former does not recognize our distinction between *mala prohibita* and *mala in se*, but divides offences into crimes and misdemeanors (*Delitos y faltas*) with regard only to the severity of the punishment imposed on each. Crimes are classified as grave or less grave (*graves ó menos graves*) according as to whether the prescribed punishment is exemplary (*aflictiva*) or correctional (*correccional*). Misdemeanors may be identical offences slighter in degree (Art. 6; compare also the "crimes" penalized in Articles 345-53 with the "misdemeanors" in Articles 603-4). This classification has a mischievous effect. By calling all infractions of law "crimes," and confounding murder in one category with the breach of sanitary ordinances, the creation of "statutory crimes" is encouraged, and popular abhorrence of crime is diminished. The "crimes" hitherto alluded to, which are practically all *mala prohibita*, are not the only ones of their kind in the Code, another example being the crime of "usurpation of office, rank, and titles and the unlawful use of names, dress, insignia, and decorations" (Book II., Title IV., Ch. VII.). This and similar chapters betray a sad lack of confidence in the public functionaries, whose practices they indicate all too clearly.

Official abuses, such as these provisions were designed to correct must inevitably be developed by an administrative system that winks at its servants extorting illegal fees to eke out inadequate pay — a political system that makes the military superior to the civil authorities — and a legislative system that, while maintaining a penal code, permits the enactment of special laws (*leyes especiales*) and the issue of ministerial regulations (*reglamentos*) orders or decrees (*órdenes ó decretos*) containing authority to do acts forbidden by the Code, or providing punishments for acts not therein penalized. Such organic injustice often makes the individual an innocent law-breaker, for the law is as inaccessible to him in its entirety as the tables of Caligula, while the prosecuting officer is practically certain beforehand to obtain the conviction he



desires. This engenders hatred of law in the individual, and, on the other hand, makes those administering it lax, venal, or tyrannical, as they are by disposition careless, covetous, or vindictive.

The Code contains but six hundred and thirty-four sections, written with a clearness and terseness that puts to shame our verbose modern statute-writing. Yet it is emasculated at the outset by the proviso (Art. 7): "Crimes that may be penalized by special laws are not subject to the provisions of this Code"; and its last article (634) is a reaffirmation of its weakness: "All the general penal laws existing prior to the promulgation of this Code are hereby abrogated, *excepting those relating to crimes not subject to its provisions.*" The Code is still further enfeebled by the fact that crimes committed by military or administrative officers cannot be punished until their superiors have heard the case, and turned the offender over to the criminal law for trial.

The highly intellectual men who framed the Code seem to have been aware of this weakness, and, in view of the difficulty of bringing public functionaries to trial at all, to have multiplied the enumeration of offences for which, at any rate, it might be lawful to punish them — a list that shows as low a moral sense pervading the civil administration as the chapters relating to political offences would indicate as existing among the military and clergy.

For instance: public functionaries must not levy illegal taxes nor collect them by coercion (Arts. 212, 213); nor take away private property (Art. 216); nor falsify documents in any of the manners following:

- "1. By counterfeiting or feigning any writing, signature or rubric.
- "2. By injecting into the recital of any proceedings the participation therein of persons who had no such participation.
- "3. By attributing to those who were present thereat, declarations or recitals different from those which they made.
- "4. By falsifying the truth in the narration of proceedings.
- "5. By altering true dates.
- "6. By inserting in a genuine document any alteration or interlineation which should alter its sense.
- "7. By giving out a copy authentic in form, of a fictitious document, or by averring in a copy a contrary or different thing from that which the genuine original contained.
- "8. By intercalating any instrument in a *protocollo*, register, or official record." (Art. 310).

Nor shall they "invent or falsify a telegraphic despatch" (Art. 313); nor issue fraudulent passports, permits (*cédulas*), and certificates (Arts. 316, 320); nor connive at the attribution of titles of nobility to impostors (Art. 343). Judges are to be punished for pronouncing unjust sentences (Arts. 357-362) or shirking the duty of pronouncing any, or "maliciously delaying" justice (Art. 364). Public prosecutors are liable for "maliciously failing" to prosecute delinquents (Art. 365) — jailors, for "connivance in the escape of prisoners" (Art. 369) — and all officials entrusted with public documents, for stealing, destroying or hiding them (Art. 371), breaking their seals or wrappers (Arts. 372-3), giving out unauthorized copies of them or revealing their contents, or trading in the secrets of private individuals that they have become cognizant of (Arts. 374-5). Lastly, chapters IX., X., XI., and XII., of Title VII., Book II., penalize the acts of public officials who accept bribes, embezzle public funds, commit frauds, make illegal exactions, or engage in unlawful speculations; and Chapter VIII. at least provides a penalty for crimes that stained Spanish rule in Cuba — the soliciting by prison-keepers of women under their custody or the female relatives of other prisoners; and the same offence, when committed by any functionary against women having "applications before him awaiting his decision or about which he has to inform or consult his superior officer."

With powerful and upright courts and prosecutors, it would seem that a code so severe on governmental officers should amply protect a private individual from oppression; but this appearance of strength is deceptive. Suppose some functionary has detained or opened a man's private letters, and he complains about it? He will find that this is only punishable in a "functionary not being a judicial authority" (Arts. 207-8) — that he is objecting to an act of the Court — and he will be lucky if he is not fined or imprisoned for "disrespect of authority." Supposing his house is entered in the dead of night — its contents searched and inventoried — and that he himself is ordered to leave town without trial or sentence? Is it likely to encourage him to seek redress to know that this was "a case provided by law," — perhaps by a decree he never heard or — that "the constitutional guarantees had been suspended"? (Arts. 203-5, 210-11). Suppose he is arrested, and the jailor keeps him for days without commitment by a judge, or even judicial knowledge of his detention, perhaps putting him *incomunicado* without leave to speak or write to any one — is it



satisfying to be told that this performance is lawful, because the functionary was "acting in obedience to an order of the civil or military authority, issued in the exercise of special powers conferred by a law"? (Art. 201, Sec. 8).

If such reservations and qualifications render private individuals powerless as against official persecution, how does it strengthen a judge to have to decide whether the reclamation of the military or administrative authority for the remission of a criminal cause to them can be safely resisted by him? (see Arts. 195-6). Or whether he may disregard the enforcement of the order of some "superior authority"? (Art. 376). It is as likely to weaken his own initiative as to strengthen his resistance to usurpation of power by other branches of the government, to know that public functionaries have individual discretion not to enforce an order "that should constitute an open, clear and definite infraction of a Constitutional precept," or "wherein any other law is openly, clearly and definitely infringed" (*Ib.*). Such conflicts of the law do not work to the benefit of any one except public officers desirous of screening responsibility behind them. The private individual is at their mercy.

Eliminating from the Code these elements of weakness and oppression, all of political origin, it becomes easier to compare what remains with American penal statutes. The treatment of crimes against the person and property differs, on the whole, very little from our own. Murder and manslaughter are classified as Parricide (the murder of a spouse or any relative), Assassination, and Homicide. Libel and Slander are confused between Calumny and Contumely (*Calumnia y Injuria*), each embracing elements of both the offences as known among us. The crime of arson is extended to cover setting fire to canefields, nurseries, and standing grain. Crimes against chastity are not as severely punished as with us, and bear heavily against women. A husband may kill his wife when taken in adultery without other penalty than banishment (Art. 437), or have her and her paramour imprisoned (Art. 447); but his own adultery is only punishable if he "keep a concubine in his house or out of it with scandal" (Art. 452). Marriage is hampered by the Penal Code (Book II., Tit. XI., Ch. II.), as well as by the Civil Code (Book I., Title IV.), the marriage of minors without their parents' consent being even made a crime punished with imprisonment (Art. 494). This, in the ecclesiastical interest, of course. The statutes relating to minor crimes

against the person and property have no peculiar distinction from our own.

There are some rather admirable provisions for punishing fraudulent insolvents (Book II., Title XIII., Ch. V.), that might well be copied and enforced in our legislation. Among them occurs one of the two unconsciously humorous passages in the Code. Fraudulent insolvency is to be presumed (Art. 553, Sec. 2), if a man "have lost in any kind of gaming, sums in excess of what an orderly father of a family should risk, by way of recreation, in that sort of entertainment." The chapter on duelling (Book II., Title VIII., Ch. IX.), is deliciously solemn fooling. Article 439 provides that whoever kills a man in duel shall suffer a long term in prison — a shorter term if he wounds him — a jailing in any event. Article 440 reduces these penalties to banishment and fine respectively, whenever imposed: —

"1. Upon the challenged person who should fight because he had not obtained from his adversary an explanation of the reasons for the duel.

"2. Upon the challenged person who should fight because of his adversary having refused to accept adequate explanations or proper satisfaction for the offence that had been inferred.

"3. Upon a person outraged in his honor, who should fight because he had not been able to obtain from the offender the adequate explanation or proper satisfaction for which he had asked."

Article 445 provides: "The duel which takes place without the presence of two or more seconds, elder in years to each of the combatants, and without their having selected the arms and arranged all the other conditions thereof, shall be punished," etc.

Book III., devoted to Misdemeanors, does not require discussion. Many are the identical offences before styled "crimes," only less grave in nature and punishment. The rest are mere ordinances of order and sanitation, or relate to petty trespasses and the like.

Book I., defining crimes and misdemeanors, the persons responsible, and the nature and extent of the penalties therefor, is entitled to real respect as an intellectual achievement, although it offends radically against our theory of penology.

The modern idea that the reclamation of the prisoner is the end in view wherever possible, depending so much on the discretion of the judge, is virtually omitted from this code. The saving chance that a jury may allow a young or unfortunate person is altogether lost. The Spanish penologists, with apparent sincerity, strove to



make infallible recorders out of fallible human judges, in whose hands lay the life and death of accused persons, contending unequally against the prosecution ever since they were haled before the committing magistrate. To this end, instead of giving a judge wide discretion, they strictly limit it, yet make these very limitations elastic, with the evident idea that if all are duly noted the judge will merely have to find a prisoner guilty, and the law will provide a penalty graded to the nicety of a day. The labor and pains with which this immense and barren task has been accomplished deserved a better subject. The result, at all events, is so novel that it is difficult to understand without reading the whole book. To give an idea of it: There are nine circumstances that extenuate and twenty-six that aggravate criminal responsibility; there are concerned in a crime, principals, accomplices, and accessories; the crime itself may be either consummated, frustrated, or attempted. Supposing an accessory to a frustrated crime be found guilty, and it is shown that while he was less than eighteen years old (an extenuating circumstance), he had acted for the sake of money (an aggravating circumstance), how shall the judge sentence him? By a mathematical computation, as hereafter shown.

Punishments (Title III., Chap. II.) are imposed according to a general scale, as follows:—

#### EXEMPLARY PUNISHMENTS.

Death (by the garrote).

Life chains (*cadena perpetua*).

Life imprisonment at hard labor (*reclusión*) outside of Cuba and Porto Rico.

Life imprisonment without hard labor (*relegación*) outside of Cuba and Porto Rico.

Expulsion for life (*extrañamiento*) from Spanish territory.

Chains for a term of years.

Imprisonment at hard labor for a term of years.

Imprisonment without hard labor for a term of years.

Expulsion for a term of years.

Imprisonment at hard labor in Cuba or Porto Rico (*Presidio mayor*).

Imprisonment without hard labor in Cuba or Porto Rico (*Prision mayor*).

Confinement in a penal settlement (*Confinamiento*).

Perpetual absolute disqualification.

Temporary absolute disqualification.

Perpetual especial disqualification	{	From public office the right of suffrage, active and passive, pro- fession or trade.
Temporary especial disqualification		

## CORRECTIONAL PUNISHMENTS.

*Presidio correccional* (a shorter term). \**Prisión* " " " " ).Banishment (*destierro*) from a locality, as fixed by the Court.

Public censure.

Suspension from office, etc.

Imprisonment at place of offence (*Arresto mayor*).

## LIGHT PUNISHMENTS.

Imprisonment in offender's house, etc. (*Arresto menor*).

## PUNISHMENTS COMMON TO THE FOREGOING.

Fines.

Giving bonds (*caución*).

## ACCESSORY PUNISHMENTS.

Degradation (of a civil officer).

Civil interdiction.

Subjection to the surveillance of the authorities.

The punishments prescribed in the first two classes, and fines, are divided into maximum, medium, and minimum degrees. Besides this, some punishments carry with them others, as life imprisonment at hard labor does civil disqualification (Tit: III., Ch. III.).

The Code then prescribes the degree of penalty to be imposed, from that applicable to principals in consummated crimes down to accessories in attempts, by the singular table (Title III., Ch. IV., Sec. 1), shown on page 135.

Where a penalty is imposed "in its minimum and medium degree," etc., the term is a compound of those two. See table on page 136.

The classification further proceeds to fix how many degrees of punishment shall be added or subtracted for aggravating or extenuating circumstances (*Ib.*, Sec. 2).

It proceeds to make a number of groups of punishments, with regard to their relative "superiority" or "inferiority," by relation to the respective severity of the above-named penalties and the degrees of each, and evolves another table (*Ib.*, Sec. 3), shown on page 136.

To return to the question to be determined by the judge, he would find what the penalty for the crime was; he would then allow two degrees for the extenuation of youth, add one for the aggregation of venality, turn to the tables, look the exact figures up, and have his sentence ready-made.



For dealing with automata, hardly a more perfect machine could be devised; for restraining, disciplining, and elevating human beings, hardly a worse, for it makes justice mechanical, and the judge a mere calculator of formulas. Even were the garrote, chains hung from waist to ankle, banishment and penal colonies, not alien to our jurisprudence, to say nothing of the minor penalties of civil interdiction (virtual outlawry) and surveillance by the authorities, this mechanical device never can be made to do justice as fairly as a human judge and a decent jury.

	Penalty affixed to the Crime	Penalty belonging to the <i>Principal</i> in the <i>Frustrated Crime</i> , and the <i>Accomplice</i> in the <i>Consummated Crime</i> .	Penalty belonging to <i>Principal</i> in <i>Attempt</i> at <i>Consummated Crime</i> , <i>Accessory</i> in same <i>Crime</i> , and <i>Accomplice</i> in <i>Frustrated Crime</i> .	Penalty belonging to <i>Accessory</i> in <i>Frustrated Crime</i> and <i>Accomplices</i> in <i>Attempts</i> .	Penalty belonging to <i>Accessory</i> in <i>Attempt</i> to commit a <i>Crime</i> .
1st case.	Death.	<i>Cadena Perpetua</i> .	<i>Cadena Temporal</i> .	<i>Presidio Mayor</i> .	<i>Presidio Correccional</i> .
2d case.	From <i>Cadena Perpetua</i> to Death.	<i>Cadena Temporal</i> .	<i>Presidio Mayor</i> .	<i>Presidio Correccional</i> .	<i>Arresto Mayor</i> .
3d case.	From <i>Cadena Temporal</i> in its maximum degree to Death.	<i>Presidio Mayor</i> from its maximum degree to <i>Cadena Temporal</i> in its medium degree.	<i>Presidio Correccional</i> from its maximum degree to <i>Presidio Mayor</i> in its medium degree.	<i>Arresto Mayor</i> from its maximum degree to <i>Presidio Correccional</i> in its medium degree.	Fine, and <i>Arresto Mayor</i> in its minimum and medium degrees.
4th case.	From <i>Presidio Mayor</i> in its maximum degree to <i>Cadena Temporal</i> in its medium degree.	<i>Presidio Correccional</i> from its maximum degree to <i>Presidio Mayor</i> in its medium degree.	<i>Arresto Mayor</i> from its maximum degree to <i>Presidio Correccional</i> in its medium degree.	Fine, and <i>Arresto Mayor</i> in its minimum and medium degree.	Fine.

Had the results of such a scheme to make human justice errorless and self-recording been such as to gratify the people for whom it was fashioned, we might well permit it to continue among them; but as it has only contributed to misery and oppression, we are under no obligation to respect its pretensions.

Such a laborious and consistent work will not bear amendment. Nor will its entire repeal work any hardship in destroying established custom. The civil law endears itself by a thousand ties to those whose whole life's actions it directs and safeguards, and whose

estates it will faithfully transmit to their posterity. No penal code ever endeared itself to any one, nor would the repeal of one disturb a single vested interest. This Code was imposed on its people by aliens. It is not their own handiwork, and except for one or two petty references to sugar-cane and the trespasses of cattle, it might as well have been designed for Denmark as the West Indies. No one

DEMONSTRATIVE TABLE OF THE DURATION OF THE DIVISIBLE  
PENALTIES AND OF THE TIME WHICH EACH ONE OF  
THEIR DEGREES COMPRISES.

PENALTIES.	Time embraced by the Penalty in its Entirety.	Time embraced in its Minimum Degree.	Time embraced in its Medium Degree.	Time embraced in its Maximum Degree.
TEMPORARY <i>Cadena, Reclusión, Relegación, Expulsion.</i>	From 12 years and a day to 20 years.	From 12 years and a day to 14 years and 8 months.	From 14 years, 8 months and a day to 17 years and 4 months.	From 17 years, 4 months and a day to 20 years.
<i>Presidio &amp; Prisión mayor. Confinamiento.</i> TEMPORARY absolute or especial Disqualification.	From 6 years and a day to 12 years.	From 6 years and a day to 8 years.	From 8 years and a day to 10 years.	From 10 years and a day to 12 years.
<i>Presidio &amp; Prisión Correccional.</i> Banishment.	From 6 months and a day to 6 years.	From 6 months and a day to 2 years and 4 months.	From 2 years, 4 months and a day to 4 years and 2 months.	From 4 years, 2 months and a day to 6 years.
Suspension.	From 1 month and a day to 6 years.	From 1 month and a day to 2 years.	From 2 years and a day to 4 years.	From 4 years and a day to 6 years.
<i>Arresto Mayor.</i>	From 1 month and a day to 6 months.	From 1 to 2 months.	From 2 months and a day to 4 months.	From 4 months and a day to 6 months.
<i>Arresto Menor.</i>	From 1 to 30 days.	From 1 to 10 days.	From 11 to 20 days.	From 21 to 30 days.

will regret its disappearance with the other mementos of evil days. What is humanely intended in it exists in every American code. Men of leisure and genius, it is true, could alter it into an American code; but events will not wait, and to administrators, not of genius but of practical sense, the old Louisiana precedent will seem the more simple and the most certain to produce a uniformity of reform.

Lloyd McKim Garrison.



# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

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## TWO THEORIES OF CONSIDERATION.—

DEAR MR. EDITOR,—Will you permit me to correct two errors in my article on "Consideration" printed in the last number of the *Review*. The first is a misprint. In line 19 of page 31 "think itself" should be "promise itself."

The other error, I regret to say, is not a misprint. I should like, however, to substitute for so much of the sentence as follows the word "is" in line 23 of the same page, these words: "to find the consideration in the mere act of giving the promise requested in these cases, and yet to deny the quality of consideration to the same act in other cases." Professor Williston certainly did not fall into the same fallacy which he had detected in another. It is with great regret that I find myself unable to agree with my friend and colleague as to the essence of consideration. But it is doubly painful to discover that I did him the injustice of giving an erroneous reason for my dissent from his view. I hope that this correction may meet the eyes of all who happen to read my misconceived criticism.

JAMES BARR AMES.

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JURY TRIAL IN THE DISTRICT OF COLUMBIA.—According to the common law of England, no verdict of a jury could be reviewed by another jury on appeal to a superior court. This rule was adopted in the American colonies, with the exception of New England and Georgia; at all events, it governs that ideal jury which our federal Constitution guarantees. The application of this principle to the courts of the justices of the peace of the District of Columbia has recently been determined by the Supreme Court of the United States in an able and learned opinion by Mr. Justice Gray. *Capital Traction Co. v. Hof*, 19 Sup. Ct. Rep. 580. These courts were established by Act of Congress, which continued their existence as under the laws of Maryland. Appeal was provided to the Supreme Court of the District, before a jury if desired. In 1823 the jus-

tice was authorized to summon a jury of twelve men to his assistance and herein arose the difficulty. The defendant in the present case was sued in a civil action before the justice of the peace. If the first proceedings were a trial by jury, then they could not be reviewed by a jury in the court above. But it appeared that the so-called jury of the justice's court was established by analogy with similar courts in New York; and it had become the recognized usage of these courts that the jury was no more than a body of referees, the judge having no authority, to direct as to the law or to set aside the verdicts. In the absence of such authority, there could be no true trial by jury, and so the court held.

So far the jury trial before the Supreme Court of the District would be regular. The next question was whether it would be unduly interfered with by the fact that a preliminary hearing had been held before the justice, — whether the defendant was entitled to a jury in the first instance. The case of *Callan v. Wilson*, 127 U. S. 540, had to be dealt with, where it was held that the defendant in a criminal prosecution for conspiracy could not be tried in a police court without a jury. The express ground of the decision was that the police court had no jurisdiction; but it was further said by way of dictum that the defendant was entitled to a jury before the proper court without any preliminary. That theory is distinguished in the present case; the court says the different considerations apply to the Seventh and Sixth Amendments, to criminal and to civil proceedings. In criminal prosecutions the prisoner is entitled to a "speedy trial," and his liberty is to be protected against undue process of law. This reasoning may differentiate the cases; if it does not, the theory of *Callan v. Wilson* should give way, for it seems to be based upon a narrow method of dealing with the constitutional guaranties. The decision of the principal case, at all events, is satisfactory; the provision for a jury trial before the appellate court would seem to give all the essential protection which the Constitution aimed to secure.

The opinion is also interesting as giving a hint of the probable attitude of the court in regard to the right of the inhabitants of our newly acquired islands to a jury trial. "It is beyond doubt at the present day that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia." Three cases are cited; *Callan v. Wilson*, *supra*, alone squarely decided the point, and the decision was not a fully considered one. At all events, the District of Columbia may be distinguished from territories generally. The remaining cases cited refer to other territories, — Iowa and Utah. *Webster v. Reid*, 11 How. 437; *Thompson v. Utah*, 170 U. S. 343. The Iowa case is based upon the Act of Congress which applied to Iowa the clauses of the Constitution; the Utah case had the same basis, although some dicta went further. See 12 HARVARD LAW REVIEW, 205. The point is not yet *res adjudicata* as to territories generally; but the court is showing no temper to reconsider its former dicta; and if the constitutional provisions are not applied to the Philippines, the result is likely to be accomplished only by distinguishing the Philippines from our formerly acquired territories.

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WAR REVENUE ACT OF 1898.—The recent case of *Nicol v. Ames*, 19 Sup. Ct. Rep. 522, is notable since it passes upon an important clause of the War Revenue Act of 1898, but it seems to add no new point to the vexed



questions of taxation. One section of the Act imposed a tax on "each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of Trade or other similar place" and required a stamped memorandum to be delivered to the buyer. It was contended that this amounted to a tax on the property sold and so was a direct tax, but the court, refusing so microscopic and theoretical a point of view, declared it a tax on the privilege or facility of carrying on sales in a general market, and so clearly in the nature of a duty or excise. The decision seems most sensible. The "privileges" of bankers, brokers, and the like have been constantly taxed, and such a tax has been, and may be, administered by stamps as well as by a fixed license fee. It was contended that the tax was not uniform, since it did not include all sales, that it was unfair to discriminate between sales at exchanges and sales at other places, that this was substantially a tax on the right to transact business and that exchanges should not be thus singled out, but that contention simply shuts its eyes to the facts regarding exchanges. Sales at exchanges do differ radically from sales at any other place, "the privilege of effecting such sales is so far distinct as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed." *Gulf, Colorado, & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155. Again the tax is geographically uniform and by means of the stamps regulates the amount to be paid by the extent to which the privilege is used. Surely there can be no ground for objection on the score of uniformity.

Another point, this time in regard to the interpretation of the Act, is decided in the case, that a sale of live stock at the Union Stock Yards in Chicago counts within the statute as a sale "at any exchange, or board of trade, or other similar place." This construction, clearly in line with the decision as to the constitutional question in the main branch of the case, seems broad enough to include any place where buyers and sellers have exceptional facilities for transacting sales of chattels of any sort.

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WRITTEN CONTRACTS AND EXTRINSIC EVIDENCE. — In *Violette v. Rice*, 53 N. E. Rep. 144 (Mass.), the plaintiff contracted with the defendant to take the part of "Bertha Gessler" in a play called "Excelsior, Junior." The agreement was in writing and required the plaintiff "to render services at any theatre." The contention was that the word "services" was orally agreed at the time of the contract to mean services in a particular part. But the court refused to vary the words of the contract by an extrinsic agreement which, it declared, contradicted the written language. An engagement for services was a general employment which could not be specially limited to a single part.

It is commonly stated that parol evidence is inadmissible to vary a written instrument. But this is merely stating a rule of substantive law under the guise of a rule of evidence. If the law of deeds or wills refuses to allow a certain claim or defence, parol evidence is of course inadmissible to prove it, for even if established it will do no good. Thayer, *Preliminary Treatise on evidence*, p. 409. The general rule, however, is by no means inflexible and the substantive law of writings often allows contemporaneous collateral matter to affect a written instrument. But the cases are not unanimous as to how far a court may wander from the document before it. *Naumberg v. Young*, 44 N. J. Law, 331,

declares that if the writing appears on its face to contain the full engagement of the parties, no extrinsic agreement can be shown. This rigid doctrine, aimed to simplify, is really unworkable. It is often harsh and unjust and, like the old Statute of Fines, must break down under such defences as fraud and mistake. A better rule—practicable and just—is that of *Chapin v. Dobson*, 78 N. Y. 74. The incompleteness of the instrument need not appear on its face. If viewed in the light of all the surrounding circumstances, it does not appear to contain the whole agreement between the parties, an additional collateral bargain may be shown, subject always to the proviso that the sound judgment of the court does not regard it as inconsistent with the actual terms of the document. *Brown v. Byrne*, 3 E. & B. 703.

Under this lenient rule the result of the present case is too rigid. In the case of an actor of little note the term "services" might well be applied to any part which emergency might require. But in the case of a well-known performer one might expect an engagement of a particular character. Extrinsic facts would seem to indicate that the plaintiff was accustomed to take certain parts such as she contended was the actual understanding of the parties. In the light of all the circumstances the contract would not appear to be complete, and the collateral agreement not repugnant to the writing. Apart from any technical meaning of the word "services," a question not raised in the case, the Massachusetts court might sustain the defendant in compelling the plaintiff to shift scenery.

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CONTRACTS — MEASURE OF DAMAGES. — In the case of *Connolly v. Sullivan*, 53 N. E. Rep. 143 (Mass.), the view is expressed that, when one party to a contract is prevented by the other from completing performance, the one so prevented may recover the value of the labor and materials already furnished, independently of the contract price. The facts show that an agreement was made by terms of which certain excavations were to be made for a stipulated sum. The work proved more expensive than was contemplated. The plaintiff, however, continued until stopped by the defendant, at which time the value of labor and materials furnished was considerably in excess of the sum for which the plaintiff had contracted to do the whole work. The question, then, was whether the plaintiff in view of such a termination of the contract by the defendant should be allowed to recover the full value of such labor and materials, regardless of the contract price.

A distinction is to be made between those cases when the plaintiff himself is in default, and when, as in this instance, the defendant prevents further performance. Keener, *Quasi-Contracts*, p. 313, n. In this latter class of cases, there is a conflict of authority. In *Koon v. Greenman*, 7 Wend. 121, when work was stopped by reason of defendant's failure to furnish materials as agreed, a ruling that recovery was not limited by the rates of contract was reversed as error. But in *Derby v. Johnson*, 21 Vt. 17, the plaintiff recovered an amount in excess of the contract price. The court attempted to distinguish the case from *Koon v. Greenman*, *supra*, but its success is at least open to question. *Doolittle v. McCullough*, 12 Ohio St. 360, presents facts not unlike the present case. There a charge that the value of the work was to be found without reference to the contract was held erroneous.



It is argued in support of the rule in the present case that the contract ought not to be considered as still existing as a measure of recovery, inasmuch as the defendants, who themselves have terminated it, would then be allowed to take advantage of it in defeating the plaintiff's recovery for work and materials expended of which the defendants have had the benefit. But it seems a much stronger argument that, had the contract been completed, only the contract price would have been paid, and that when the work is stopped a real saving is effected to the plaintiff, for he is thereby relieved from further expenditures which, under a completed contract must be a net loss to him. If he himself had terminated the contract, the contract price would be the limit of recovery. Accordingly, on principle and authority, it is desirable not to follow the rule suggested in the principal case.

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INTERSTATE RENDITION. — The case of *Eaton v. State of West Virginia*, 91 Fed. Rep. 760 (C. C. A. Fourth Cir.), presents a question regarding interstate extradition of criminals not often directly raised. The plaintiff in error was indicted for arson in West Virginia. Requisition was made to the Governor of Illinois when the culprit was found and he was surrendered to the demanding State. In an application for a writ of *habeas corpus* his contention was that he was not present in West Virginia when the crime was committed and he was not, therefore, a fugitive from justice of that State. In proceedings in error the writ was refused, on the ground that when the warrant was issued in Illinois it was enough if merely presumptive proof of the relator's flight from West Virginia was given. The case involves a discussion of the nature and the extent of proof of escape which a demanding State ought to furnish in asking for the surrender of an offender.

In the absence of decisions squarely on the point, it is said on the one side that the State making requisition ought to give to the executive from whom surrender is desired evidence proving the fact of escape. In *Ex parte Reggel*, 114 U. S. 642, this view is clearly supported, on the ground that anything short of proof of actual flight might create an injustice by requiring surrender, on the strength of official records, of one whom the executive knew to be not in fact a fugitive from the demanding State. On the other side, it is contended that submission of records of formal indictment, with an affidavit, is sufficient ground on which to base the presumption of actual flight. Where this view prevails, the relator cannot overthrow the presumption as to his escape by merely denying the truth of the records. *Ex parte Swearingen*, 13 S. C. 74; *Hibler v. The State*, 43 Tex. 197 (Sup. Ct.).

Owing to the importance of the question as affecting the rights of citizens, the greatest freedom from technicalities is desirable. But a proper regard for the accuracy of official records must also be maintained. By adopting the course suggested in the principal case, both ends are kept in view, and, so far as practicable, brought together. It recognizes the common-law view of crimes as local in character by holding that the presentations of the indictment and affidavit is sufficient *prima facie* evidence of actual flight of the one demanded. Due credence is therefore given to these papers of the demandant. The executive on whom requisition is made is given presumptive proof upon which it is justified in issuing a warrant for arrest and surrender, while the relator may rebut

that presumption against him by showing in some court of the State where the warrant is issued that the facts are not consistent with the records upon faith of which the executive acted. The rights of the citizen are thus protected by giving him the opportunity to vindicate himself while the validity of official proceedings is upheld until conclusive error is shown.

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DANA *v.* VALENTINE FOLLOWED IN ENGLAND. — In *Dana v. Valentine*, 5 Met. 8, the plaintiff owned certain vacant lots next to the defendant's slaughter-house, which caused offensive smells in the vicinity. The court held in a *dictum* that the plaintiff had an adequate remedy at law to prevent the defendant's gaining a prescriptive right to maintain the nuisance although the plaintiff could show no actual damage. And this *dictum* is generally followed in the United States. *Farley v. Gate City Gas Co.*, 31 S. E. 193 (Ga.). Some fifty years later the English Court of Appeal in Chancery had the same question presented to it, and gave a different answer. *Sturges v. Bridgman*, 11 Ch. D. 852. There the defendant, a confectioner, had been accustomed to use mortars in his kitchen for more than twenty years. The plaintiff then extended the rear of his house so that it adjoined the defendant's kitchen, and for the first time was seriously annoyed by the noise from the mortars. He was allowed an injunction, because the defendant had gained no prescriptive right inasmuch as the plaintiff had been unable to bring action until actual damage was suffered. No action on the case would lie without proof of substantial loss. The only possible distinction between the two cases — that in *Dana v. Valentine* the nuisance was always apparent, while in the English case it could not be perceived until the actual damage occurred — seems an unsatisfactory refinement.

The recent English decision in *Roberts v. Gwyrfai District Council*, [1899] 1 Ch. D. 583, would then seem revolutionary. The plaintiff had a natural right to the uninterrupted flow of a stream by his land. The defendant wrongfully altered the flow of water as it passed the plaintiff's tenement. No actual damage resulted, yet it was held that plaintiff's common law right had been infringed and the wrongdoer was enjoined from further interference. *Sturges v. Bridgman* was not brought to the attention of the court and the question was dealt with somewhat summarily. In following the accepted American rule it reached a wholesome result. While it is hard for one who at present does not wish to use his land in a certain way to be deprived of its future use, it is harder still for one committing the nuisance to be driven out of business simply because a neighboring proprietor decides to change his mode of occupation. It would be in the power of the latter to destroy at his option permanent and extensive works. Public policy would seem to require an exception to the rule that an action on the case requires substantial damage when a property right has been infringed for more than twenty years, though the damage has been merely nominal. 12 HARVARD LAW REVIEW, 284.

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TENDENCIES FROM YEAR TO YEAR. — It is well settled law that if a tenant for years holds over at the end of his term, the landlord has the option of treating him as a trespasser, or as a tenant from year to year where such tendencies are allowed. This is founded on a supposed agreement between the parties, implied from the mere fact of holding over. *Conway*



v. *Starkweather*, 1 Den. 113. An exception to this general rule is illustrated by a late case decided in the Supreme Court of Canada. The plaintiff let lands to the defendant under a lease for eleven months, at a rent of \$600 per year, payable monthly. The defendant held over for ten months after the end of his lease, paying the former monthly rent, and then left after a month's notice. It was held that the defendant became a tenant from month to month and not from year to year, and so was liable for no further rent. *Chase v. Richards*, Canadian Law Journal, April 15, 1899.

This decision evidently attained practical justice, and it seems also to be correct on principle. The test of whether the tenancy was from month to month or from year to year would seem to depend on what was the implied agreement on holding over. And it is well settled that a tenant, in so holding over is impliedly bound by the agreements of his first lease, so far as they are consistent with the new tenure. Hence in all jurisdictions, even where tenancies from year to year are not allowed, the rent due under the former lease is binding on the tenant until a new agreement is substituted, whether he becomes a tenant from year to year or at will. *Weston v. Weston*, 102 Mass. 514. The principal case would seem to turn on what would have been the nature of the tenancy if the defendant had entered for an indefinite time with the agreement to pay rent monthly at the rate of \$600 per year, and it seems probable that this would not have been a tenancy from year to year. While it is not necessary in order to create such a tenure that rent should be payable yearly, it should be apparent that the parties contracted with the year as the unit of payment. Hence it is created if an annual rent is payable half yearly, or quarterly, as this implies that the tenancy was intended to last for a year at the least. *Richardson v. Langridge*, 4 Taun. 128. In the principal case, the rent, though at the rate of \$600 per year, can hardly be called an annual one, as it was not payable yearly or in any fractional part of a year. The defendant was, therefore, a tenant from month to month, and in such a case a month's notice is sufficient. *Steffens v. Earl*, 11 Vroom 128 (N. J.). The decision is especially worthy of notice as showing a reaction against a tendency of the courts to imply tenancies from year to year in many cases contrary to the manifest intention of the parties. See *Haynes v. Aldrich*, 133 N. Y. 287.

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DEPOSIT OF NOTES FOR COLLECTION AND EQUITABLE ASSIGNMENTS. — The distinction between a trust and a debt is well illustrated by cases where a negotiable paper has been deposited in a bank for collection. If the transaction is a simple deposit and not a discount, the bank holds the paper in trust for the depositor until collection, and then becomes a debtor for the amount collected. The practical result of this change in the bank's obligation to the depositor is, that in the event of bankruptcy, the latter can recover the note from the bank before it has been collected, but after collection he must come in with the general creditors. *National Bank v. Hubbell*, 117 N. Y. 384; *St. Louis Co. v. Johnston*, 133 U. S. 566.

A somewhat peculiar situation arises where the bank gives a check on a second bank for the amount collected, and then becomes bankrupt before the check is honored. Since the payee or a check has no direct claim against the drawee bank the depositor is still only a creditor of the collecting bank, and has no preferred claim to the deposit against which

the check was drawn. *First National Bank v. Whitman*, 94 U. S. 343. The debt has not been extinguished but merely suspended, and the depositor must take his dividend with the other creditors. The courts, however, do not seem to favor this result and have escaped it by raising the doctrine of equitable assignment or equitable lien. An agreement between the depositor and the collecting bank is implied to the effect that the depositor shall have an equitable lien on the deposit in the second bank. The nature of this lien seems to be either that the collecting bank declares itself a trustee of the debt due from the drawee bank, or that there is a partial assignment of this debt. Undoubtedly such a transaction is possible, and would attain the desired result, but it seems that such an agreement is a fiction. If made in contemplation of bankruptcy it would probably be void as against creditors, and if made in the ordinary course of business can hardly be implied by the mere giving of a check. Nevertheless the depositor has been preferred on this ground. *Fourth St. National Bank v. Yardley*, 165 U. S. 634.

A recent case on this point, decided in the U. S. Circuit Court of Pennsylvania is *National Union Bank v. Earle*, New York Law Journal, April 19, 1899. The plaintiff employed the defendant to collect a note, and received in payment a check against a second bank. This check was collected, but owing to a rule of the Clearing House the plaintiff repaid the money to the drawee bank, which paid it to the defendant. The plaintiff was allowed to recover the money from the defendant as a preferred creditor. The court placed its decision on two grounds, first, that there had been an equitable assignment; and secondly, that the rule of the Clearing House was not intended to have the same effect as if the check had never been collected, but merely to put the money in a safe place until it should appear who was best entitled to it. On this interpretation of the facts the case is undoubtedly correct, for the plaintiff had merely to prove his good faith to become entitled to the money. On the payment of the check he was no longer a creditor of defendant, and the money, having returned to the latter without any right in him to call for it, was held in trust for the person best entitled. The case is also interesting as showing a decided approval of the doctrine of equitable assignment, — which, though open to criticism for the reasons given above, seems to be fairly settled.

JUDICIAL INITIATIVE. — The power of a trial justice to influence a jury is a dangerous one, — when, either consciously or unconsciously, he so conducts himself as to influence the result of the trial, to lead the jury to a conclusion, there is strong reason for holding that a new trial should be allowed. In *Bolte v. Third Ave. Ry. Co.*, 56 N. Y. Supp. 1038 (Sup. Ct., App. Div., First Dept.), this was the actual course adopted. The action was brought for personal injuries sustained by the plaintiff through carelessness of defendant's servants. During the proceedings the trial justice took it upon himself to develop the plaintiff's case by asking his witnesses many questions which would have been objectionable if asked by the counsel for the plaintiff. The defendant's exceptions were overruled and judgment was given for the plaintiff. On appeal, the court above not only reversed the order, but further said that even if no exception had been taken, the mere fact of the extreme exercise of judicial power in taking such initiative would have been sufficient to warrant reversal.



In any trial before a jury, it is not required that the judge should be a mere presiding officer. As a matter of necessity he has certain discretionary powers whereby he may aid in bringing about speedy and accurate results. In him is vested an initiative which allows him, if necessary, to clear up, by means of judicious questioning, points of fact for presentation to the jury. Just how far a justice may thus actively interpose in the conduct of a trial cannot be determined by hard and fast rules. To bind him too closely is as fatal to beneficial results as to recognize no limits whatever to his power of initiative. It is, therefore, a question of degree upon which jurisdictions differ. The English practice allows the court considerable freedom, while some of our States closely restrict it, both as to summing up and also as to commenting on evidence during the trial.

It is clear, however, that a higher court must always have the power to prevent a straining of this initiative. In the principal case the facts undoubtedly show an extreme use of this discretionary power; for whatever may be its limits, it cannot be said to extend so far as to allow the Court to supplant the counsel for either side in the development of the case for the jury. *Wheeler v. Wallace*, 19 N. W. Rep. 33 (Mich.), recognizes such abuse of judicial discretion as a cogent reason for granting relief by a court of review. And a more recent case, *Dunn v. People*, 50 N. E. Rep. 137 (Ill.), objects in definite terms to examination of witnesses by the Court in criminal trials as prejudicial to fair results. The Court, therefore, in the present instance reaches a sound and just conclusion in holding this action reversible error.

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PRIVILEGE OF WITNESSES WHO ARE PARTIES TO THE SUIT. — It seems to be an unsettled point in the law of evidence at the present time, as to just what is the effect of a claim of privilege by a party to the suit who has put himself on the stand as a witness in his own favor. Does he waive all his privileges by offering to testify, or, if not, can inferences be drawn against his case from his refusal to give all the evidence in his power? In the ordinary case, if a party to the suit can be shown to have withheld evidence of any sort bearing on the merits of the case without any excuse for its non-production, this is allowed to count heavily against him. *Wylde v. Northern R. R. Co.*, 53 N. Y. 156. But if he refuses to give further evidence on the ground of privilege, though logically there is a strong probability that he is keeping back the evidence because he knows that it would be harmful to his case, still on theoretical grounds this should cause no inferences to be drawn, for otherwise the privilege becomes a mere nullity. Indeed, this seems to have been the fundamental idea of a privilege, that the claim of it was perfectly proper and could never be used against the witness. *Rose v. Blakemore*, Ryan & Moody, 382.

From this point of view a recent Massachusetts case seems logically indefensible. The defendant called as a witness a former attorney of the plaintiff, and asked him as to certain confidential communications made to him by the plaintiff. On the claim of privilege by the attorney conducting his case, the court ruled that the plaintiff in person must assert or waive his privilege, and take the responsibility of it on himself. To avoid the inference that he was withholding evidence which might hurt his case, the plaintiff then waived his privilege, but took exceptions to the

ruling. The Supreme Court held, however, that there was no error, for while the plaintiff had not waived his privilege by going on the stand himself, yet even if he had refused to allow his attorney to testify, this would have been a proper subject of comment and inference by the jury. *McCooe v. Dighton R. R. Co.*, 53 N. E. Rep. 133 (Mass.).

It cannot be doubted, however, that the two positions taken by the court are logically inconsistent, for if the party still has his privilege, then no inferences should be allowed from his asserting it. This seems to be the English law to-day. *Wentworth v. Lloyd*, 10 H. L. C. 589; see also *Bigler v. Rehler*, 43 Ind. 112. In this country the point is not settled. In criminal cases there is a square conflict, some courts holding that the defendant waives all his privileges by going on the stand, and others that he waives none. Compare *Commonwealth v. Nichols*, 114 Mass. 285, and *Chesapeake Club v. State*, 63 Md. 446. In civil cases there seems to be very little authority on the point, and it is doubtful how far the principal case would be followed. While not logical, it takes, in the actual result reached, a convenient position between the two extremes of complete waiver of all privileges and waiver of none, with no inferences to be drawn. The party is protected in that he is not obliged to give evidence tending to incriminate himself, nor can his attorney without his consent give evidence which might subject him to a prosecution for perjury, and yet his opponent is not made to suffer by the exercise of this safeguard, and the merits of the case are made to appear directly or by a legitimate inference. For these practical reasons the decision seems satisfactory and may very probably be followed.

## RECENT CASES.

AGENCY—INSURANCE POLICIES—WAIVER OF CONDITION.—An insurance agent accepted overdue premiums from the insured in several instances. *Held*, that forfeiture for non-payment of a premium when due may be thus waived although the policy expressly states that no waiver shall be valid unless in writing signed by an officer of the company. *James v. Mutual Life Assn.*, 49 S. W. Rep. 978 (Mo.).

A contrary result has been reached in the case of an express waiver, by an agent, on the ground that knowledge by the insured of the terms of his policy is to be presumed, and that therefore the principal cannot be held since the agent has clearly exceeded his authority. *Smith v. Niagara Ins. Co.*, 60 Vt. 682; *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356. The decisions in accord with the principal case do not question this well settled doctrine of agency, but either decide that such a restriction in a policy is inoperative because inconsistent with the rule of law that there may be a waiver by parol, or find an estoppel arising independently of the agent's authority. *Dwelling House Ins. Co. v. Dowdall*, 55 Ill. App. 622; 1 Joyce, Ins., § 439. The exact ground of the decision in the principal case is not clear, but it may well be supported on the second reason suggested. The insurer must have known of the overdue payment of the previous premiums, and having made no objection, should be estopped from insisting on the forfeiture.

AGENCY—UNAUTHORIZED CONTRACT—LIABILITY OF AGENT.—The defendant, as agent of R., entered into an unauthorized contract with the plaintiff, which R. repudiated. *Held*, that the defendant is liable to the plaintiff on an implied warranty of authority. *Cochran v. Baker*, 56 Pac. Rep. 641 (Oreg.).

The weight of authority is in favor of this view of the agent's liability as to unauthorized contracts. *Collen v. Wright*, 8 E. & B. 647; *Baltzen v. Nicolay*, 53 N. Y. 467. But as the point is a new one in Oregon, it is to be regretted that the court did not adopt a rule more in accord with the real nature of the transaction. It is hardly logi-



cal to imply a contract between the supposed agent and the third party which neither intended to make. Moreover, such a step is unnecessary, for there is no valid reason why the agent should not be held in an action of tort for his false representation of authority. Unfortunately this view has found little support though it has been suggested in several cases. *Jefts v. York*, 64 Mass. 392, 395; *May v. Western Union Tel. Co.*, 112 Mass. 90, 94. The importance of ascertaining the true nature of the liability is apparent when it is remembered that the damages may differ considerably if the wrong is regarded as a tort rather than a breach of contract.

AGENCY — VICE-PRINCIPAL. — The appellee's husband, an employee of appellant, was killed by the negligence of another employee whom it was his duty to obey. *Held*, that a servant does not assume risks growing out of the negligence of vice-masters whom it is his duty to obey. *Fort Worth Ry. Co. v. Wrenn*, 50 S. W. Rep. 210 (Tex., Civ. App.).

This doctrine finds considerable support in this country. *Little Miami Ry. Co. v. Stevens*, 20 Ohio, 415; *Union Pacific Ry. Co. v. Doyle*, 50 Neb. 555. But it has never been recognized in England; and since the case of *Baltimore & Ohio Ry. Co. v. Baugh*, 149 U. S. 368, it appears to be losing ground in America. According to the better view, the master's liability depends upon the character of the duty being performed by the negligent employee, irrespective of any question of his control over the injured party; and can only arise where the duty is one which the master owes his employees and has delegated to one of them. *Jackson v. Norfolk & Western Ry. Co.*, 43 W. Va. 380; *Crespin v. Babbitt*, 81 N. Y. 516. The mere fact that one employee holds a lower position than another in the common employment can hardly be considered sufficient to take the case out of the operation of the fellow-servant rule; but where the master owes a duty to his employees, it is clear that he cannot escape liability by delegating it to one of them.

BANKRUPTCY — COMMON LAW ASSIGNMENTS. — The bankrupt had, before the adjudication, made an assignment of all his property for the equal benefit of his creditors under a Missouri statute, regulating such assignments. *Held*, that although this statute is not superseded by the United States Bankruptcy Act, the trustee in a subsequent bankruptcy may recover the assigned estate from the assignee. *Davis v. Bohle*, 92 Fed. Rep. 325 (C. C. A. Eighth Cir.).

This decision having been made by the Circuit Court of Appeals may be regarded as a final disposition of a question which has already been several times before the District Courts with a like result. *Re Gutwillig*, 90 Fed. Rep. 475; *Re Bruss-Ritter*, 90 Fed. Rep. 651; *Re Sievers*, 91 Fed. Rep. 366. The United States Bankruptcy Act expressly provides that the trustee can recover such common law assignments as are fraudulent conveyances or fraudulent preferences, § 70; but it fails to provide that the usual assignment, which is neither, can be so recovered. This omission had to be supplied by construction. An obviously sound result has been reached. It leaves the assignment its proper place in the law of insolvency; but keeps it in its due subordination to bankruptcy. See 12 HARV. LAW REV. 503.

CARRIERS — SPECIAL CONTRACT — BURDEN OF PROVING NEGLIGENCE. — A mule was shipped under a special contract exempting the carrier from liability from any cause but negligence. The mule died in transit. *Held*, that the burden is upon the carrier to prove his own due care. *Mitchell v. Carolina, etc. Ry. Co.*, 32 S. E. Rep. 671 (N. C.).

Cotton was shipped under a special contract exempting the carrier from loss by fire. The cotton was destroyed by fire in transit. *Held*, that the burden is upon the shipper to show negligence on the part of the carrier. *National, etc. Ins. Co. v. Erie, etc. Ry. Co.*, 53 N. E. Rep. 382 (Ind.).

A carrier may limit his absolute common law liability by special contract; but no contract can exempt him from liability for loss by his negligence. *New York, etc. R. R. Co. v. Lockwood*, 17 Wall. 387; *Hoadley v. Northern, etc. Co.*, 115 Mass. 304. The principal cases represent a direct conflict of authority, the question being whether, when a loss is *prima facie* covered by the exemption, the burden is upon the carrier to show due care or upon the shipper to prove negligence. Many states hold with the first principal case. *Louisville, etc. R. R. Co. v. Touart*, 97 Ala. 514; *Erie R. R. Co. v. Lockwood*, 28 Oh. St. 358; *Chicago, etc. R. R. Co. v. Moss*, 60 Miss. 1003. On the other hand the weight of authority is with the second. *Western, etc. Co. v. Downes*, 11 Wall. 133; *Cochran v. Dunsmore*, 49 N. Y. 249; *Pennsylvania R. R. Co. v. Rawdon*, 119 Pa. St. 577. The cases for the shipper are generally supported upon the weak reason that the facts lie peculiarly within the knowledge of the carrier. But the cases for the carrier rest upon the fundamental principle that he who would charge another with loss by negligence must prove it. Moreover, if the courts allow the carrier upon grounds of policy

to contract out of his common law liability, they cannot arbitrarily place this burden upon him without defeating their object. Accordingly, the second principal case is to be preferred.

CONSTITUTIONAL LAW — SEVENTH AMENDMENT — JURY TRIAL. — A civil action for damages was brought before a justice of the peace of the District of Columbia. An Act of Congress had given such court jurisdiction, allowing the justice of the peace to summon a jury, and providing for appeal to the Supreme Court of the district, with another jury. A writ of *certiorari* was issued by the Supreme Court of the district directing a removal to a common-law court. On quashing the writ, *held*, that the trial by the justice's court was not a trial by jury within the Seventh Amendment, and that the jury trial before the appellate court was not unduly interfered with by the trial before the justice of the peace. *Capital Traction Co. v. Hof*, 19 Sup. Ct. Rep. 580. See NOTES.

CONSTITUTIONAL LAW — WAR REVENUE ACT. — The War Revenue Act of 1898 imposes a tax on "each sale, agreement of sale or agreement to sell any products or merchandise, at any exchange or board of trade, or other similar place." *Held*, that the tax is constitutional. *Nicol v. Ames*, 19 Sup. Ct. Rep. 522. See NOTES.

CONTRACTS — CONSIDERATION — FORBEARANCE. — *Held*, that a forbearance to sue upon a groundless claim is a sufficient consideration to support the promise of a third party to pay the amount claimed. *Di Iorio Di Biasio*, 42 Atl. Rep. 1114 (R. I.).

The court here adopts a doctrine which was first laid down with respect to cases of this kind in *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449. There is no intimation in the opinion of the court that to constitute a sufficient consideration to support a promise the thing done by the promisee must be a legal detriment to him. The case is, therefore, directly in line with the position taken in 12 HARV. LAW REV. 515, that in the present state of the authorities consideration should be defined to be "any act or forbearance by one person given in exchange for the promise of another." See 12 HARV. LAW REV. 276.

CONTRACTS — CONSTRUCTION. — A written contract required the plaintiff, an actress, "to render services at any theatre" of the defendant. It was contended that at the time of making the contract this was agreed by the parties to mean services in a particular part. *Held*, that this cannot be shown. *Violette v. Rice*, 53 N. E. Rep. 144 (Mass.). See NOTES.

CRIMINAL LAW — DOUBLE JEOPARDY. — In a trial for the illegal disinterment of a human body the defendant pleaded a former acquittal on a charge of malicious destruction of the coffin. *Held*, that this is no bar to the prosecution. *State v. Mazzone*, 56 Pac. Rep. 648 (Oreg.).

A contrary result has been reached where "the proof shows the second case to be the same transaction with the first." *Roberts v. State*, 14 Ga. 8. The principal case, however, is in accord with the better view, in holding that if no one act is a necessary ingredient of both offences there may always be a prosecution for each. *Josslyn v. Commonwealth*, 47 Mass. 236; *State v. Warner*, 14 Ind. 572; *Commonwealth v. McShane*, 110 Mass. 502. Either of the offences charged might, in legal contemplation, have been committed without committing the other, and therefore trial for the one cannot be said to have purged the defendant of the guilt of any essential ingredient of the other.

CRIMINAL LAW — INTERSTATE RENDITION. — The plaintiff-in-error was tried for arson in West Virginia after being extradited from Illinois. On application for *habeas corpus*, he claimed that he was not in West Virginia when the crime was committed. *Held*, that the writ was rightly refused, presumptive proof that the relator was in fact a fugitive being sufficient. *Eaton v. State of West Virginia*, 91 Fed. Rep. 760 (C. C. A., Fourth Cir.). See NOTES.

CRIMINAL LAW — PARDON PENDING APPEAL. — The defendant, pending an appeal from a judgment of conviction, accepted the governor's pardon. *Held*, that he is not entitled to review that part of the judgment assessing a fine and costs against him, since the acceptance of a pardon is an admission that he was rightly convicted. *Manlove v. State*, 53 N. E. Rep. 385 (Ind.).

The court held that this case was governed by the rule that a person who has accepted a benefit based on the correctness of a judgment is thereafter estopped from questioning it. *Bennett v. Van Syckel*, 18 N. Y. 481. *Waddingham v. Waddingham*, 27 Mo. App. 607. The application of this principle to the present facts seems improper, for, according to the true view, it is applicable only to civil suits, and then only when the judgment is in favor of the appellant. 4 Wait, Pr., 216. The decision may, however, be supported on the ground that a party will not be permitted to occupy an



inconsistent position before the law. If he cannot be compelled to submit to a judgment if found against him, he should not have the benefit thereof if in his favor. *Wilson v. Commonwealth*, 10 Bush, 526; *Norton v. Commonwealth*, 88 Ky. 501.

**DAMAGES — CONTRACTS — PROFITS —** *Held*, that the recovery of profits lost as damages for breach of contract is governed by the same rules as the recovery for other damages. *Central Trust Co. v. Clark*, 92 Fed. Rep. 293 (C. C. A., Eighth Cir.).

The court simply applies with extreme strictness the accepted rule which limits the consequential damages for a breach of contract to those within the contemplation of the parties at the time of entering into the agreement. *Hudley v. Buxendale*, 9 Ex. 341; *Cory v. Thames, etc. Co.*, L. R. 2 Q. B. 181; *Horne v. Midland Ry.*, L. R. 7 C. P. 583. Whether, under the circumstances of the principal case, the general rule is to be applied is left in doubt by the authorities. The difficulty arises from another rule of damages, much cited, which requires that the loss be shown with certainty. *Rice v. Rice*, 104 Mich. 371. In consequence of this, it has often been said that the loss of profits can never be shown as an item of damage, since profits are by nature uncertain. *Griffin v. Colver*, 16 N. Y. 489; *Howe Machine Co. v. Bryson*, 44 Iowa, 159. However, many decisions hold that profits are provable in proper cases. *Dennis v. Maxfield*, 92 Mass. 138; *Wolcott v. Mount*, 30 N. J. Law, 262. The latter cases are based upon the better conception of the rule requiring certainty: that it merely expresses the elementary principle that a party must prove his damages by a preponderance of evidence. *Allison v. Chandler*, 11 Mich. 542. Accordingly, the principal case is correct in holding that there is no special rule for profits.

**DAMAGES — TORTS — REMOTENESS.** — The plaintiff purchased a ticket on the representation of the defendant's agent that the train would make connection at M. It did not, and the plaintiff, in order to reach her destination that day, drove eight miles. *Held*, that the plaintiff cannot recover for illness caused by the drive and exposure to a rainstorm on the way. *Foulks v. Southern Ry. Co.*, 32 S. E. Rep. 464 (Va.).

The court proceeds upon the ground that the illness was too remote, since it could not reasonably have been anticipated at the time of the agent's wrongful act. This limitation to the right to damages in such cases finds some support in the authorities. *Hobbs v. London, etc. Ry.*, L. R. 10 Q. B. 111. But the weight of authority is in favor of the sounder rule that damages may be recovered for all natural and proximate consequences of the wrongful act, whether they could be supposed to have been in the contemplation of the parties or not. *Brown v. Chicago, etc. Ry.*, 54 Wis. 342; *McMahon v. Field*, 7 Q. B. D. 591. In the principal case the negligence of the agent forced the plaintiff to drive to her destination; the exposure and subsequent illness were direct and natural results of the drive, and the defendants should have been held to answer for them. *Pickens v. South Carolina, etc. R. R. Co.*, 32 S. E. Rep. 567 (S. C.).

**EVIDENCE — RES GESTA.** — In a prosecution for using profane language, evidence was introduced that while committing the offence the defendant attempted to strike X. *Held*, that the evidence is admissible as part of the *res gesta*. *Watson v. State*, 50 S. W. Rep. 340 (Tex., Cr. App.).

*Res gesta* is sometimes used to describe facts that form a part of the general story of the crime or breach of duty to be inquired into. *Agassiz v. London Tramway Co.*, 21 W. Rep. 199; 1 Stark. Ev. 1st ed., 39. The witness in testifying is not restricted to stating the bare fact in issue, but may detail the surrounding circumstances. However, the better and more generally accepted sense in which the term is used is to describe that exception to the rule against hearsay admitting statements which are a part of some fact or transaction in itself admissible. *Waldele v. New York, etc. R. R. Co.*, 95 N. Y. 274. It does not clearly appear in which sense *res gesta* is used in the principal case; but the decision is only intelligible by giving to the term the first meaning. It could not be contended that a hearsay statement was admissible, because it was in regard to a fact which happened at the time of the fact in issue. See 11 HARV. LAW REV. 343.

**EVIDENCE — WITNESSES — PRIVILEGED COMMUNICATIONS.** — The defendant questioned a witness as to confidential communications made to him, in the capacity of attorney, by the plaintiff. Over objection the court forced the plaintiff to assert or waive his privilege in person, and the latter allowed the questions to be put. *Held*, that there is no error. *McCooe v. Dighton, etc. Ry. Co.*, 53 N. E. Rep. 133 (Mass.). See NOTES.

**FEDERAL COURTS — FORCE OF STATE DECISIONS.** — A United States statute provides that the laws of the several States shall be the rules of decision in trials at common law in the federal courts. *Held*, that a federal court is not bound by the only case in point decided in the supreme court of the state many years before and since repeatedly doubted. *Stowe v. Belfast Savings Bank*, 92 Fed. Rep. 90 (Cir. Ct. Me.).

The United States Courts allow themselves great freedom in deciding what is the law of any state. Though they will always follow a line of uniform decisions in the supreme court of the state they will not be absolutely bound on a point on which the courts do not agree, or when there are but few cases in point, the doctrines of which are of doubtful soundness. *Burgess v. Seligman*, 107 U. S. 20; *Gelpcke v. Dubuque*, 1 Wall. 175. Such decisions, therefore, are only obligatory on the federal courts to the extent they would be acknowledged to be in their own jurisdictions. *Day v. James*, 8 Wheat. 495, 542. The principal case is, therefore, clearly sound. See 8 HARV. LAW REV. 328.

**MUNICIPAL CORPORATIONS — EXCLUSION OF NON-UNION LABOR.** — A board of education restricted the bidding for work on public building so as to exclude non-union labor. The cost of the work was thereby much increased. *Held*, that the restriction is invalid. *Adams v. Brennan*, 52 N. E. Rep. 314 (Ill.).

The question, whether it is within the discretionary powers of a municipal corporation to exclude non-union men from employment on public works if resulting in increased expense, seems rarely to have been judicially treated. The decision in the principal case is obviously correct. Whatever may have been the object of this board of education in favoring trade-unions, and whether or not the result would be for the general public advantage, it was hardly in the line of their official business to expend public money for this purpose. The primary duty to the public was to secure the most advantageous contract possible for accomplishing the work under their direction, and any regulation which prevented the attainment of this end was clearly invalid. For a similar expression of opinion on this question see *Lynch v. Josiah Quincy*, "Boston Advertiser," Jan. 26, 1898, Superior Ct., Richardson, J.

**PRACTICE — JUDICIAL INITIATIVE.** — In an action for personal injuries the trial justice asked leading and suggestive questions which would not have been competent if asked by the plaintiff's counsel. *Held*, that a reversal is warranted. *Bolte v. Third Ave. Ry. Co.*, 56 N. Y. Supp. 1038 (Sup. Ct., App. Div., First Dept.). See NOTES.

**PROPERTY — DEEDS — ACCEPTANCE.** — *Held*, that where a deed, delivered to a third party for the grantee, is clearly beneficial to the latter, his acceptance is presumed in the absence of actual dissent. *Wenster v. Folin*, 56 Pac. Rep. 490 (Kan., Sup. Ct.).

The question is important as affecting the interests of intervening third parties. The principal case is probably in accord with the numerical weight of authority. *Mitchell v. Ryan*, 3 Ohio, 377; *Myrover v. French*, 73 N. C. 609. The contrary view, that an actual acceptance is necessary in a deed, as in any other contract, and that it is absurd to presume such an acceptance where the grantee does not know that the deed exists, is ably presented in *Welsh v. Sackett*, 12 Wis. 243, and is supported by considerable authority. 2 Jones, Real Property in Conveyancing, § 1276. The weak point in the reasoning of the latter cases is that a conveyance is not generally regarded as a contract. It contains no agreement, and there cannot be a breach. The law finds no difficulty in raising a presumption of acceptance where the grantee is an infant or insane, and may well do so in such a case as the present one, if a better working rule is gained thereby.

**PROPERTY — DEEDS — BOUNDARIES.** — Land was described in a deed of conveyance as bounded in part "by the southeasterly side of Bloomingdale Road." *Held*, that the fee to the middle of the road is not included. *Deering v. Reilly*, 56 N. Y. Supp. 704 (Sup. Ct., App. Div., First Dept.).

When land is described in a deed as bounded on a highway, there is always a presumption that the fee to the middle of the way is intended to pass. 1 Jones, Real Property in Conveyancing, § 484 ff. Even where the side of the way is expressly designated, the weight of authority, in opposition to the principal case holds that this presumption is not rebutted. *Cox v. Freedley*, 33 Pa. St. 124; *O'Connell v. Bryant*, 121 Mass. 557. *Contra*, *Buck v. Squiers*, 22 Vt. 484. In the former cases the departure in construction from the more strict and natural meaning of the grantor's language seems well advised, for it is extremely improbable that the grantor should actually intend to reserve for himself a narrow strip of isolated land, which would be of no particular value to any one but the adjoining owner.

**PROPERTY — FEE SIMPLE CONDITIONAL — POSSIBILITY OF REVERTER.** *Held*, that the possibility of reverter on failure of a fee simple conditional is devisable as "a right of entry for a condition broken" within the meaning of section 3 of the Wills Act. *Pemberton v. Barnes* [1899], 1 Ch. D. 544.

Since the Statute *De Donis* fee simples conditional have survived in England only in the case of copyhold estates held of manors in which there is no custom to entail. The nature of the possibility of reverter which remains in the grantor has, therefore, received little consideration. The actual decision of the principal case seems reasonable



enough, but the *obiter* discussion of the question whether or not the possibility of reverter is an estate in the land is of more interest. If it is an estate it is alienable *inter vivos*, or devisable without the aid of such special language as the Wills Act contains. Otherwise it is, like the right of escheat, inalienable. North, J., admits that the little authority on the point is in conflict. In South Carolina, where the statute *De Donis* has never been in force and where, consequently, fee simples conditional still exist, it has been held that the possibility of reverter is not an estate, but as its name implies, only a possibility, "the mere remembrance of a condition upon which a present estate may be defeated, and a future one arise. *Adams v. Chaplin*, 1 Hill Eq. 265, 277. In most jurisdictions the question is of course only of speculative interest.

PROPERTY — FRAUDULENT CONVEYANCE. — A silk company executed a bill of sale of goods to a bank, as security for indebtedness, but retained possession of them. Creditors of the company subsequently attaching the goods, held, that the conveyance to the bank is conclusively presumed to be fraudulent since the vendor retained possession. *Hadden v. Dooley*, 92 Fed. Rep. 274. (C. C. A., Second Cir.).

There are two extreme views, many American and the earlier English cases holding with the principal case. *Hamilton v. Russel*, 1 Cranch, 309; *Colt v. Ives*, 31 Conn. 25; *Edwards v. Harben*, 2 T. R. 587. On the other hand, several American decisions of weight and the later English cases hold that under these circumstances fraudulent intent is a question of fact for the jury. *Ball v. Loomis*, 29 N. Y. 412; *Brooks v. Powers*, 15 Mass. 244; *Martindale v. Booth*, 3 B. & A. 498. There can be no doubt that the latter cases reach the better result. Constructive fraud has a place in the law of fraudulent conveyances only when defrauding creditors is a necessary consequence of the act done. Retention of possession, however, has by no means that inevitable result. Nor does policy demand the artificial rule contended for. Accordingly, upon principle, the present case can hardly be supported.

PROPERTY — LICENSE — INTERRUPTION BY THIRD PARTY. — A parol license was given to maintain a sewer through the licensor's land. Held, that the licensee can recover damages from a third person for interfering with the sewer. *Miller v. Inhabitants of Greenwich*, 42 Atl. Rep. 735 (N. J., C. A.).

This decision, which may be regarded as sound, shows the inaccuracy of the statement that such a license is "merely an excuse for a trespass"; a statement often given as a reason for holding that licenses are revocable. *Wiseman v. Lucksinges*, 84 N. Y. 31. There is a great dearth of authority on the exact point presented in the principal case, which, however, reaches a satisfactory result in viewing the licensee as practically a tenant at will of the right of drainage. *Ottawa Gaslight Co. v. Thompson*, 39 Ill. 598 (*semble*). A parol license will not bind the licensor, because of the Statute of Frauds. That is not a reason, however, for protecting third persons, who seek to prevent an exercise of his legal right by the licensee, and the latter should be allowed to maintain an action on the case for such interference with his lawful acts.

PROPERTY — LIFE TENANT — PERMISSIVE WASTE. — Held, that a life tenant is not liable to the remainderman for the destruction of a house on the estate by accidental fire. *Sampson v. Grogan*, 42 Atl. Rep. 712 (R. I.).

This case raises the question of the extent of a life tenant's liability for permissive waste. In England, the weight of authority seems to have been that a life tenant was liable for all permissive waste. *Woodhouse v. Walker*, 5 Q. B. D. 404; *Yellowley v. Gower*, 11 Ex. 274. But the question was never entirely free from doubt. *In re Cartwright*, 41 Ch. D. 532. Any liability for accidental fires, which may have existed in England was removed by statute in 1707. Only in a few of the states is this statute in force, and where it is not the point raised by the principal case seems never to have been directly adjudicated. The long continued silence of American courts on the subject gives considerable weight to the view taken, that a tenant for life has never been liable in this country for loss by accidental fire. 4 Kent, Com., 82. Historical considerations aside, the substantial justice of the decision cannot be questioned.

PROPERTY — PERCOLATING WATERS — RIGHT TO WITHDRAW. — The city built extensive wells which drew off the water percolating through the plaintiff's land, thus rendering it unfit for crops. Held, that the defendant is liable for the damage done. *Porbell v. City of New York*, 56 N. Y. Supp. 790 (Sup. Ct., Sp. Term.).

This decision is *contra* to *Chasemore v. Richards*, 7 H. L. Cas. 349, but follows the only American case in which the exact point has been adjudicated. *Smith v. City of Brooklyn*, 46 N. Y. Supp. 141. The court lays down the general doctrine that the right to percolating water comprises only the right to use it on the owner's land. But by the weight of authority the right to such water is absolute. *Acton v. Blundell*, 12 M. & W. 324; *Chatfield v. Wilson*, 28 Vt. 49. And, moreover, while the principal case asserts that it is the subject of correlative rights it rejects the only logical conclusion,

namely, that the reasonableness of the user is the measure of those rights. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569. The actual result, however, accords with the view taken by the New Hampshire court, and in a jurisdiction where the question is still open that view might well be followed. The ends of practical justice and convenience can only be reached by restricting to reasonable limits the right to use percolating water, nor does such restriction seem inconsistent with the landowner's natural rights.

**PROPERTY — STATUTE OF LIMITATIONS — ADVERSE USE.** — In an action for the recovery of land which the defendant had taken possession of and occupied under a mistaken belief that it was his own, *held* that the Statute of Limitations did not begin to run against the plaintiff until the defendant had made a claim of ownership other than the mere occupation of the land, and notice of the claim had been brought to the knowledge of the plaintiff. *Conrad v. Sackett*, 56 Pac. Rep. 507 (Kan., C. A.).

The doctrine of this case obtains in several jurisdictions in the United States. *Gilchrist v. McLaughlin*, 7 Ired. 310; *Grube v. Wells*, 34 Iowa, 148. It is generally held, however, that if one takes possession of and occupies land of another as his own his possession is adverse, irrespective of whether he knew at the time of his entry that the land belonged to some one else or honestly thought it was his own. If he continues such occupation for the statutory period he thus acquires an indefeasible title. *French v. Pearce*, 8 Conn. 439; *Sumner v. Stevens*, 47 Mass. 337. This view of what constitutes adverse possession is certainly more in conformity with the object of the statute. If the true owner by his laches permits the property to remain out of his control for the statutory period he should not then be heard to complain.

**TORTS — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF.** — The plaintiff, a brakeman, was injured while passing under a bridge on the defendant's cars. In an action to recover therefor, *held*, that the burden of establishing that he was exercising due care is on the plaintiff. *Williams v. Delaware, etc. R. R. Co.*, 57 N. Y. Supp. 203 (Sup. Ct., App. Div., Fourth Dept.).

The declaration in an action to recover damages caused by the defendant's negligence contained no allegation of the plaintiff's due care. On demurrer, *held*, that the declaration is sufficient. *Brother's Admr. v. Rutland R. R. Co.*, 42 Atl. Rep. 980 (Vt.).

The weight of authority is against the first case and the decisions are not unanimous as to the second; but both cases seem sound on principle. The question of lack of due care on the plaintiff's part was put in issue under the Hilary Rules by the plea of not guilty. *Bridge v. Grand Junction R. R. Co.*, 3 M. & W. 244. The burden is upon him to show that the defendant's negligence was the legal cause of the injury, which is equivalent to proving that want of due care by the plaintiff was not a part of that cause. *Bower v. Danville*, 53 Vt. 183. However, it is only necessary that the declaration should show a duty owing from the defendant and a breach of that duty. It is not essential that it allege absence of negligence on the part of the plaintiff, as such allegation is involved in the averment that the injury complained of was occasioned by the defendant's negligence. *Lee v. Troy, etc. Co.*, 98 N. Y. 115.

**TORTS — INJURY TO DOG.** — *Held*, that the owner of a dog can recover damages for negligent injury thereto. *Salley v. Manchester & A. R. Co.*, 32 S. E. Rep. 526 (S. C.).

This decision is doubtless correct and is in accord with the great weight of authority. *Ten Hopen v. Walker*, 96 Mich. 236; *St. Louis, etc. Ry. Co. v. Stanfield*, 63 Ark. 643; *Citizens, etc. Co. v. Dew*, 100 Tenn. 317. An opposite view was taken in *Jemison v. Southwestern R. R.*, 75 Ga. 444. At common law a dog was not the subject of larceny because, it was said, there could be no property in it. *Findlay v. Bear*, 8 S. & R. 571. Nevertheless, at an early date, it was held that there was sufficient property in a dog to enable the owner to maintain a civil action for damages thereto. *Bro. Abr.*, tit. Trespass, 407. Clearly it should be so held to-day in view of modern conditions of life and the fact that dogs are very generally the subject of taxation.

**TRADE MARKS — GEOGRAPHICAL NAMES — INJUNCTION.** — The defendant, a watch manufacturer in Waltham, used the word "Waltham" upon the plates of his watches without any addition distinguishing them from watches made by the plaintiff. *Held*, that he may be enjoined from so doing, the word by long use having come to designate to the public generally the plaintiff's watches. *American Waltham Watch Co. v. United States Watch Co.*, 53 N. E. Rep. 141 (Mass.).

The rule laid down in the present case, restricting the use of the name of a geographical district as a trademark when it has become identified with the goods of a plaintiff, is supported by the great weight of authority. *Seixo v. Provezende*, L. R. 1 Ch. 192; *Montgomery v. Thompson*, [1891] App. Cas. 217. It is well settled that such a designation cannot be appropriated as a trade name when used only in its primary sense. *Gage-Downs Co. v. Featherbone Corset Co.*, 83 Fed. Rep. 213, 214. By long continued application to the goods manufactured by a certain person, however, the



name may acquire a secondary significance, as in the present case, and instead of merely standing for the place where the goods are manufactured, it may become a mark denoting the manufactured goods themselves. In such cases equity will enjoin the indiscriminate use of the word by others engaged in the same business, it being in fact a false representation to the public that the goods sold are the plaintiff's make.

**TRUSTS—INSOLVENCY OF TRUSTEE—PREFERENCE OF CESTUI.**—A trustee deposited trust funds in his own name in a bank with money of his own. The trustee and bank both failed. *Held*, that the *cestui que trust* is not entitled to a preference over the other creditors of the trustee for the amount of the trust fund. *Shute v. Hinman*, 56 Pac. Rep. 412 (Oreg.).

If a trustee becomes insolvent, having misappropriated the trust fund, the *cestui* is entitled to a preference over the other creditors only if he shows that the assets of the bankrupt have been increased by the misapplication of the fund, and then only to the amount of such increase. *Harrison v. Smith*, 83 Mo. 210; *Ellicott v. Brown*, 31 Kan. 170. When it has been so proved, it would be clearly inequitable for the other creditors to derive any advantage from such increase, while, if the assets have not been increased, it would be equally unjust to give the *cestui* a preference. *Cavin v. Gleason*, 105 N. Y. 256. The present case is undoubtedly correct. By the reason of the failure of the bank it is evident that the assets of the bankrupt trustee were not increased by the full amount of the trust fund, and it does not appear that the plaintiff had shown to what amount, if any, the assets had been increased.

## REVIEWS.

**THE LAW OF PARTNERSHIP, INCLUDING LIMITED PARTNERSHIPS.** — By Francis M. Burdick, Dwight Professor of Law in Columbia University School of Law. Boston: Little, Brown & Co. 1899. pp. lii, 422.

The merchants continue in their book-keeping and in other ways to treat the firm as an entity, while the lawyers and the courts continue the effort to bring this mercantile relation into conformity with the principles of the common law relating to joint ownership and joint liability.

But consistent enforcement of those principles is so incompatible with the nature of partnership that the recognition of the firm as an entity is unconsciously made in many cases in which the decision is reconcilable with no other view of partnership than that adopted by the mercantile world. A few courts are bold enough to speak of the firm as an entity, but others, while shrinking with horror from the use of the word "entity," compromise with their scruples by describing a partnership as "a concern" — *Bailey v. Hornthal*, 154 N. Y. 648, 659 — or as an "entirety." *Bratt v. McGuinness*, 53 N. E. 380 (Mass.).

Professor Burdick does not attempt a solution of the problem, but he states concisely and clearly the different views. His book is a valuable addition to existing works on partnership. Lindley on Partnership, Bates on Partnership, Beale's Edition of Parsons on Partnership, and Story's treatise with the notes by Gray and by Wharton are more useful to the practitioner than to the young student, although of service to the latter also. The last edition of Pollock on Partnership, a less elaborate work, is only a commentary on the Partnership Act of 1890 with illustrative cases.

Professor Burdick's book is the only short American work on the subject, and it is a pleasure to find it so admirably adapted to the purpose for which it was written, if that purpose can be accomplished by the use of any text-book. The principles, as found in the decisions, are clearly stated and the cases cited are well chosen.

But in our opinion it will be a hard, dry task to learn the law of Partnership by the study of even so well written a book as Professor Burdick's.

Taken up after the student has studied selected cases for six or eight months the book will prove to be both entertaining and informing. The principles extracted from the cases and stated by Professor Burdick will be recognized as old friends and the pleasure in the recognition will stimulate to further investigation. Used in this way for purposes of review we think the book will be of great value and interest to the student.

It is to be hoped that in any future edition the method of referring to other parts of the book will be changed. The references are to chapters and sections, and it is puzzling and disconcerting to be obliged to turn to the table of contents to find the page where the section begins and then to discover that the sections often cover several pages.

J. D. B.

THE ANNOTATED CORPORATION LAWS OF ALL THE STATES.—In three volumes. Compiled and edited by Robert C. Cumming, Frank B. Gilbert and Henry L. Woodward. Albany: J. B. Lyon Co. 1899.

This work is practically a cyclopædia of the statutes in all the States regarding corporations. The statutes of Alabama in regard to corporations are reprinted in the order in which they appear in the official edition of the statutes; accompanying each section of the statute is a list of headnotes of all the cases which have explained it; at the end an index of the subjects of the statutory provisions. The corporation law is thus taken up for each State in turn. There are no indexes of cases and no general index of topics. The work does not confine itself to the corporation statutes merely, but deals with the kindred subjects, receiverships, practice, liability of officers of corporations, etc.,—on the other hand it does not take up the special statute for special corporations. Yet without this the scope of the labor is gigantic.

It does not mean to compete with the corporation text-books—there is not a word of comment in the volumes—but to supplement them. It will give a workable, first-hand knowledge of the law of corporations and,—barring the questions of federal jurisdiction,—of all the law regarding them. Its value obviously will depend on its thoroughness and accuracy, and that is just where it is hardest to judge it. The important cases of the last few years are all included, the headnotes are brief and clear and seem accurate, the indexes complete; in all there is every reason to suppose that the work will prove of great practical value.

J. P. C. JR.

## BOOKS RECEIVED.

[Entry under this head does not preclude further notice of a book in this or in a later number of the Review.]

AMERICAN PRACTICE REPORTS. Editor-in-Chief, Charles A. Ray. Washington: Washington Law Book Co. 1899.  
 ANNOTATED CORPORATION LAWS. Compiled and edited by Robert C. Cumming, Frank B. Gilbert, and Henry L. Woodward. Albany: J. B. Lyon & Co. 1899.  
 GENERAL DIGEST: AMERICAN AND ENGLISH, ANNOTATED. Vol. VI., New

Series. Rochester, N. Y.: Lawyers Co-operative Publishing Co. 1899.  
 INTERNATIONAL COURTS OF ARBITRATION. By Thomas Balch. Philadelphia: Henry T. Coates & Co. 1899.  
 THE JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION. Edited by John MacDonnell. London: John Murray. 1899.



# HARVARD LAW REVIEW.

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VOL. XIII.

NOVEMBER, 1899.

NO. 3

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## THE STATUS OF OUR NEW POSSESSIONS —A THIRD VIEW.

ONLY one excuse can be offered for adding another to the many articles that have already appeared upon this theme. It is that the subject is of such supreme importance that any suggestion from a new point of view may have a value out of proportion to its own intrinsic merit. The questions presented are as novel as the conditions under which they arise, and will have to be worked out from the existing law much as the courts developed the law of railroads from the earlier law of common carriers; not by reversing established principles, but by seeking how far they are applicable to the new conditions.

The general canon for the interpretation of legal authorities is well known. It requires the search for a principle which shall reconcile all the authorities, or, if this is out of the question, a principle which shall reconcile as large a part of them as possible, so that those only are rejected which cannot by any theory be brought into accord with the rest. Of two propositions of which one is consonant with all or nearly all the authorities, and of which the other agrees only with a part of them and contradicts another part, the former is always to be preferred. Legal authorities are no doubt of different weight; the most important being actual decisions, that is judgments in cases where the point in question was so involved that the judgment could not have been rendered without

passing upon it. But although an actual decision is the most weighty, it is not the sole source of legal authority. Every opinion expressed by the court is entitled to consideration, even if it is merely a dictum. Moreover there is a difference to be observed among dicta. Those which are a part of the *ratio decidendi*, which are treated by the court itself as an essential link in the chain of reasoning by which the decision is reached, are certainly more important than those which are purely *obiter*, that is which are consciously superfluous for the purpose of deciding the case. In the interpretation of a Constitution some weight must also be attributed to the conditions under which it was framed; to previous Constitutions; to the steps by which it attained its final form; and finally to generally accepted legal opinion. The balance of authorities in any case cannot be measured with mathematical accuracy; yet their relative weight may be roughly estimated.

Two opposing theories of the application of the Constitution to our new dependencies have been put forward, and both have been very ably advocated. One opinion, represented by Professors Langdell and Thayer, in the HARVARD LAW REVIEW for February and March of this year, and by Mr. Gardiner in the "American Law Review" for March-April, holds that the limitations imposed by the Constitution upon the federal government apply only to the States, and that the term United States, when used in a territorial sense, includes the States alone. The other opinion, represented by Mr. Randolph and Judge Baldwin, in the HARVARD LAW REVIEW for January and February, holds that these limitations apply wherever the jurisdiction of the government extends, and that all territory in the possession of the nation is a part of the United States. Both of these theories reject a certain number of decisions, and it may not be impossible to formulate a third opinion which reconciles a larger proportion of the authorities than either of them.

If the two prevalent theories are examined closely each of them presents serious objections. The narrower view of the Constitution, that which limits its provisions to the area of the States, besides contradicting many judicial opinions, which will be considered in detail at a later stage of the argument, leads to conclusions sharply at variance with commonly received opinion. It allows Congress to confiscate property in the District of Columbia or in a Territory without compensation, or to take it arbitrarily from the owner and bestow it upon another person. It suffers the government to pass a bill of attainder against a resident of Washington



or of Arizona, and order him hung without trial. According to this view, moreover, a person born of alien parents in a Territory is not a citizen of the United States either by the Constitution or by statute,<sup>1</sup> and residence there is not residence within the United States for the purpose of subsequent qualification for a seat in Congress. These results are certainly opposed to the ideas that have prevailed hitherto.

Objections may be raised in like manner to the broader construction which extends the provisions of the Constitution over our new dependencies. This construction assumes that the interpretation given by the courts to the Constitution in the case of the older Territories applies to all places subject to the jurisdiction of the United States, an assumption for which there is no judicial sanction, and which actually contradicts a couple of decisions. It may be urged also that this construction is irrational, because it extends the restrictions of the Constitution to conditions where they cannot be applied without rendering the government of our new dependencies well-nigh impossible, and surely no provision ought to be given an interpretation which leads to an irrational result, if the language will bear equally well a different construction.

In seeking an interpretation of the Constitution it is proper to go backward and examine the Articles of Confederation. These created a league or union of States, and their form is that of articles of partnership. They commonly use the term "United States" to denote the States collectively. Thus, they speak of "the United States, or either of them"<sup>2</sup> "any of the United States,"<sup>3</sup> "each of the United States,"<sup>4</sup> "from one State to another, throughout all the United States,"<sup>5</sup> and their regular method of referring to the organ of federal government is "the United States in Congress assembled." In fact, they use the term "United States" in such a way that it often clearly denotes, and always may denote, the States collectively. At this time, it may be observed, the Union contained no territory not included within the limits of the several States. Hence Congress was given no power to legislate for any Territories,<sup>6</sup> and in the clause regulating the decision of disputed boundaries it is expressly provided that "no State shall be deprived of

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<sup>1</sup> Rev. Stats., Sects. 1992-93.

<sup>2</sup> Art. 4.

<sup>3</sup> Art. 4.

<sup>4</sup> Art. 9.

<sup>5</sup> Art. 9.

<sup>6</sup> In the "Federalist," No. 38, Madison remarks that, in legislating for the western lands ceded to it by the States, Congress acted "without the least color of Constitutional authority."

territory for the benefit of the United States."<sup>1</sup> In a territorial sense, therefore, the term United States covered of necessity the area of the States and that alone. For this reason the expressions "throughout the United States" and "throughout all the United States" were strictly synonymous, and were so used.<sup>2</sup>

The Constitution brought about a new relation between the States and the federal government, and the expressions suitable for articles of partnership gave way before those adapted to the charter of a corporation. It is, of course, impossible in most cases to determine with certainty whether the term United States is used to denote the States collectively, or the nation as a political entity. When the Constitution speaks of the Congress, the President, the officers, the Constitution, or the laws, of the United States, the term may be used in either sense; but certainly its constant use in a sense that is obviously collective is discarded. The only instances to be found are in the provision forbidding the President to receive "any other Emolument from the United States, or any of them;"<sup>3</sup> and in the eleventh Amendment which speaks of "one of the United States." In view of the general absence of such expressions, which recur constantly in the Articles of Confederation, these instances may perhaps be attributed to inadvertence.<sup>4</sup> In the preamble, the expression "We, the people of the United States," is manifestly used vaguely, for the Constitution was established not by a people at all, but by the States in their corporate capacity. On the other hand, the term is sometimes used in a way that can denote only a national political entity, as where the Constitution speaks of "a citizen of the United States."<sup>5</sup> A man may be a citizen of a State or of the nation, but he cannot be a citizen of several states collectively.

The position of the Confederation had changed in another way. Several of the States had ceded their claims over the Western lands to the federal government, which had thus become the possessor of territory, and provision for its management was made in the Constitution. Moreover the cession of other districts, for a federal capital, for forts, arsenals, and dockyards, was contemplated, and Congress was given power to rule them also. Now in view of these new conditions what territorial conception did the framers of the

<sup>1</sup> Art. 9.

<sup>2</sup> Art. 9, Cl. 5.

<sup>3</sup> Art. II., Sect. 1, Cl. 7.

<sup>4</sup> Prof. Langdell agrees to this in the case of Art. II., Sect. 1, Cl. 7, *HARVARD LAW REVIEW*, Feb. 1899, p. 375 and note 10.

<sup>5</sup> Art. I, Sect. 2, Cl. 2, Sect. 3, Cl. 3. Art. II., Sect. 1, Cl. 5.



Constitution attach to the term United States? Did they mean it to cover only the members of the Union that had a share of political power, that is, the original thirteen States, diminished as they had been by the cession of their Western lands; or did they mean it to include the whole territory then belonging to the nation, territory all of which had formerly been a part of the United States by being a part of the States?

In view of the existence of territory belonging to the nation, but not forming part of any State, it might be supposed that the careful draftsmen of the Constitution would have avoided, as at least ambiguous, the use of the term United States in provisions that were not intended to apply outside of the States; and it would not have been difficult so to do. Thus in the first clause of Art. I., Sec. 2, for example, the Constitution speaks of "the People of the several States," and in the next clause a representative is required to be a "Citizen of the United States." Why this change of expression if a different meaning is not intended? The framers of the Constitution recognized citizens of a State and spoke of them as such when they wanted to,<sup>1</sup> while in other places they spoke of citizens of the United States; just as they spoke of judicial officers of the several States in contradistinction to those of the United States.<sup>2</sup> Again, it is provided that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers;"<sup>3</sup> but that "all Duties, Imposts, and Excises shall be uniform throughout the United States."<sup>4</sup> If the intention had been merely that these last taxes should be uniform throughout the States, while direct taxes were apportioned among them according to population, the framers of the Constitution would no doubt have said so. The same remark applies to the provisions requiring laws of naturalization and bankruptcy to be uniform throughout the United States,<sup>5</sup> and to the clause prescribing that the President shall have "been fourteen Years a Resident within the United States."<sup>6</sup> It may be ob-

<sup>1</sup> Art. IV., Sect. 2, Cl. 1.

<sup>2</sup> Art. VI., Cl. 3.

<sup>3</sup> Art. I., Sect. 2, Cl. 3. It may be noted that the expression is not the States of which this Union may consist or be composed, but the States which may be included within this Union.

<sup>4</sup> Art. I., Sect. 8, Cl. 1.

<sup>5</sup> Art. I., Sect. 8, Cl. 4.

<sup>6</sup> Art. II., Sect. 1, Cl. 5. In the provision that Presidential Electors shall be chosen on the same day "throughout the United States" (Art. II., Sect. 1, Cl. 4), the use of the term United States in the sense of the whole national territory, although the election takes place only in those parts which enjoy political rights, certainly creates no ambiguity and does not seem inappropriate.

served in this connection that if no one can be a citizen of the United States unless he is a citizen of one of the States, then foreigners can become citizens only by being naturalized in a State, and Congress either had no power to extend the naturalization laws over the Territories, or persons naturalized there acquire none of the rights of citizens.

A similar question is presented by the limitations that guarantee personal rights. Were these imposed merely for the benefit of the States, or were they intended to protect all parts of the nation? They are certainly not expressly confined to the States, and some of them were clearly meant to have a broader application. Art. III., Sect. 2, Cl. 3, provides, for instance, that "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." This by its very terms applies to crimes committed outside of any State, and the provision was so framed with that very object.<sup>1</sup> Another clause, speaking of members of Congress, provides that "for any Speech or Debate in either House, they shall not be questioned in any other Place."<sup>2</sup> Surely this cannot mean only any place within a State, for it would lose its whole value if a member could be sued or prosecuted in the District of Columbia on a charge of Libellous statements in Congress. A third example is furnished by the fifteenth amendment. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This must apply beyond the States, because it is only outside of the States that Congress can have power to deny or abridge the right to vote.

A consideration of the political status of the Territories at the adoption of the Constitution leads to similar conclusions. At the very time when the Constitutional Convention was sitting Congress adopted the Ordinance of 1787 for the Government of the North West Territory. This concluded with a series of articles which it declared "shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent." The fourth article, — taken, by the way, from Jefferson's

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<sup>1</sup> Madison Papers, p. 1441.

<sup>2</sup> Art. I., Sect. 6.



earlier Ordinance of 1784, — provided that “The said territory and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made.” So that the North West Territory, at least, had been made by compact a part of the United States; and that this was the understanding of the framers of the Constitution is evident from the proceedings of the Convention, for on June 5, 1787, it adopted a Resolution “that provision ought to be made for the admission of States, lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise.”<sup>1</sup> This clearly refers not only to Vermont, but also to proposed States to be formed in the western territory, which is thus described as within the limits of the United States.<sup>2</sup>

The Ordinance of 1787 throws light in several ways on the application to the Territories of the provisions of the Constitution. The second of the articles already referred to provided that “the inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury;” that they shall be free from immoderate fines, and cruel or unusual punishments; that they shall not be deprived of liberty or property, but by the judgment of their peers, of the law of the land; and that their property shall not be taken for public purposes without full compensation. Now these are among the very rights guaranteed in the body of the Constitution and in the amendments of 1789, and as the Ordinance declared that its articles should be considered “articles of compact, between the original States and the people and the States of the said territory, and forever remain unalterable, unless by common consent,” it is hardly credible that the framers of the Constitution and the amendments should immediately have broken faith, by guaranteeing those rights to the original States alone, and refusing to extend the guarantee to the Territories. The fourth article of compact further provided that the inhabitants of the Territory should be subject to pay “a proportionate part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States.” This became, of course,

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<sup>1</sup> Madison Papers, p. 794.

<sup>2</sup> “The Federalist,” No. 14, speaks of the “limits, as fixed by the treaty of peace” as “the actual dimensions of the Union.”

obsolete when the Constitution did away with apportionments upon the States, but it has a bearing upon the extension to be given to the provision that "all Duties and Excises shall be uniform throughout the United States." If this involved no restriction on the power of Congress to tax the North West Territory there would surely have been another breach of faith. It would seem, therefore, that both the text of the Constitution and contemporary political history lead to the conclusion that the limitations of that instrument were meant to extend beyond the boundaries of the States.

In considering the judicial authority upon the question a distinction may be drawn between the territory belonging to the United States at the time of the adoption of the Constitution and that which has been acquired subsequently. The status of the former has been brought before the courts only in the case of the District of Columbia. The first allusion to it is in *Loughborough v. Blake*,<sup>1</sup> which involved the right of Congress to impose a direct tax upon the District, and where Chief Justice Marshall, in the course of the decision, gave his famous dictum on the meaning of the provision that duties, imports, and excises shall be uniform throughout the United States.

"Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other."

Many years later the question was presented whether the provision for trial by jury applied to the District of Columbia, and the Supreme Court decided that it did,<sup>2</sup> saying, in the course of the opinion: —

"There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases."

Within the current year the court has reaffirmed this principle, and said: —

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<sup>1</sup> 5 Wheat. 317.

<sup>2</sup> *Callan v. Wilson*, 127 U. S. 540, 550.



"It is beyond doubt at the present day that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia."<sup>1</sup>

Finally, in the case of *Bauman v. Ross*,<sup>2</sup> the court assumed that the Fifth Amendment applied, so that Congress could not take land for public purposes without just compensation.

The status of the territory acquired since the adoption of the Constitution has given birth to more abundant litigation; but in regard to this, three distinct questions arise: First, has the United States the right to acquire possessions? second, do they have the same standing as those which belonged to the nation at the time of the adoption of the Constitution? and, third, what in either case is their constitutional position?

The Constitution makes no provision for the acquisition of territory; and although Gouverneur Morris, in the letters quoted by Campbell, J., in the *Dred-Scott* case,<sup>3</sup> says that he contemplated such action, he certainly gave no intimation of it in the Constitution. The purchase of Louisiana was, however, a political necessity; and while at first Jefferson was doubtful of his own authority, and desired the sanction of a constitutional amendment, his precedent has been followed so often, and has been so thoroughly confirmed by judicial decisions and by the practice of every department of the government, that its legality is no longer a subject of dispute.<sup>4</sup>

The status of the territory after it has been acquired is quite a different matter. In the debates in Congress on the subject of the Louisiana purchase,<sup>5</sup> the Federalists took the ground that territory could be constitutionally acquired, but that it could not be made a part of the Union without the universal consent of the States. Of the Republicans, on the other hand, some prudently avoided this issue, while others boldly asserted that Louisiana became by the treaty a part of the United States on a parity with

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<sup>1</sup> *Capital Traction Co. v. Hof*, 19 Sup. Ct. Rep. 580.

<sup>2</sup> 167 U. S. 548.

<sup>3</sup> *Scott v. Sandford*, 19 How. 393, 507.

<sup>4</sup> In *Jones v. United States*, 137 U. S. 202, 212, Mr. Justice Gray said: "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as other officers, citizens and subjects of that government. This principle has always been applied by this court, and has been affirmed under a great variety of circumstances."

<sup>5</sup> See Adams, *Hist. of U. S.*, Vol. II. Chap. V.

the older territories. When the question of providing a government for the new possessions came up, the attitude of the parties was to a great extent reversed. Although in direct violation of their instructions,<sup>1</sup> the American commissioners had inserted in the treaty this article: —

“Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess.”

In spite of this, the first Act for the government of Louisiana conferred on the President arbitrary powers, without regard to any restrictions in the Constitution; and, in fact, continued in his hands the despotic system that had prevailed under the Spanish dominion. The Federalists objected that the powers given to the President were unconstitutional, and were met with the reply that the limitations of power found in the Constitution are applicable to States and not to Territories,<sup>2</sup> a doctrine which was certainly acted upon for a couple of years, when, after vigorous complaints by the inhabitants, a system of government was obtained based on that of the older Territories.

The question whether the Territories acquired by a treaty of this kind stand on the same footing as those which belonged to the United States at the time of the adoption of the Constitution has been passed upon by the courts on two or three occasions. It was first presented in the case of *Florida, in Amer. Ins. Co. v. Canter*.<sup>3</sup> In the Circuit Court, Johnson, J., was of opinion that there was a distinction between the two classes of territory, and that the States, together with the original territory, were the sole objects of the Constitution.<sup>4</sup> In arguing the case before the Supreme Court, Webster

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<sup>1</sup> Adams, *Hist. of U. S.*, Vol. II. p. 45.

<sup>2</sup> *Id.*, pp. 119-120.

<sup>3</sup> 1 Pet. 511.

<sup>4</sup> Speaking of territory acquired after the adoption of the Constitution, he said (p. 517, note): “We have the most explicit proof, that the understanding of our public functionaries is, that the government and laws of the United States do not extend to such territory by the mere act of cession. . . . At the time the Constitution was formed, the limits of the territory over which it was to operate were generally defined and recognized. These limits consisted, in part, of organized states, and in part of territories, the absolute property and dependencies of the United States. These



took, in a more incisive way, the old position of the Federalists at the time of the Louisiana purchase. "What is Florida?" he asked. "It is no part of the United States. How can it be? . . . Florida was to be governed by Congress as she thought proper. What has Congress done? She might have done anything. She might have refused the trial by jury, and refused a legislature."<sup>1</sup> It was, no doubt, on account of these statements that Chief Justice Marshall took occasion to refer to the matter in his opinion. After saying that the government of the Union possessed the power of acquiring territory by conquest or by treaty, he referred to the sixth article of the treaty of cession, which was copied in substance from the article in the treaty ceding Louisiana, and said, "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation."<sup>2</sup>

The same question arose after the cession of Mexican territory by the treaty of Guadalupe Hidalgo. In a case involving the collection of customs duties the Supreme Court held that "by the ratifications of the treaty, California became a part of the United States," and as such subject to the provision in the Constitution that duties, imports, and excises shall be uniform throughout the United States.<sup>3</sup> This principle that the status of the new Territories was precisely the same as that of the original ones seems thereafter to have been universally and tacitly assumed, except in the Dred-Scott case. In that instance Chief Justice Taney drew a distinction between the two, but for the purpose, curiously enough, not of confining the restrictions on the power of Congress to the original territory, but of making them more stringent in their application to the new possessions than to the old.<sup>4</sup> He was confronted by the prohibition of slavery in the Ordinance for the

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states, this territory, and future *states* to be admitted into the Union, are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.

"The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new states into the Union, and the government of such acquisitions is, of course, left to the legislative power of the Union, so far as that power is uncontrolled by treaty."

<sup>1</sup> 1 Pet. 538. Webster maintained in the Senate twenty years later that the Constitution had no operation in the Territories.

<sup>2</sup> *Id.*, p. 542.

<sup>3</sup> *Cross v. Harrison*, 16 How. 164, 197-198.

<sup>4</sup> *Scott v. Sandford*, 19 How. 393, 432-442.

North West Territory, and he wanted to deny to Congress the right to extend that measure beyond the Mississippi. Judge Curtis in his dissenting opinion rejects this doctrine,<sup>1</sup> and it has received no support in later decisions of the court.

Assuming, therefore, that the Territories ceded to us by France, Spain, and Mexico stand on the same footing as those originally possessed, it remains to inquire what that position has been held to be; how far, in other words, the limitations in the Constitution have been held to apply to them.

The provision that duties, imposts, and excises shall be uniform throughout the United States has been held, in accordance with the dictum of Chief Justice Marshall,<sup>2</sup> to apply to the possessions ceded by Mexico; and although the decision in the case of *Cross v. Harrison*<sup>3</sup> can, no doubt, be supported on the ground that, until Congress organized the government, the President had authority to collect duties under his general powers, still the doctrine that the provision in question applies to the Territories was by no means a mere *obiter dictum*. It was the *ratio decidendi* of the case.

The provisions securing trial by jury for crime<sup>4</sup> have been held, as we have seen, to apply to the District of Columbia,<sup>5</sup> and in a couple of other cases they have been held to operate in Utah also.<sup>6</sup> In neither of these two last cases, it is true, was the principle absolutely necessary to the decision; but in the most recent one at least, where the judgment was in favor of the prisoner, the court based its opinion upon that ground; so that, while the decision may be sustained in other ways, this principle was a part of the *ratio decidendi*. The doctrine is, moreover, reinforced by dicta in other cases.<sup>7</sup>

The Seventh Amendment, preserving the right of trial by jury in civil cases has likewise been held to be binding in the Territories. In *Webster v. Reid*,<sup>8</sup> where this question was first raised,

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<sup>1</sup> *Scott v. Sandford*, 19 How. 611-614.

<sup>2</sup> *Loughborough v. Blake*, 5 Wheat. 317.

<sup>3</sup> 16 How. 164.

<sup>4</sup> Art. III., Sect. 2, Cl. 3, and Amend. VI.

<sup>5</sup> *Callan v. Wilson*, 127 U. S. 540.

<sup>6</sup> *Reynolds v. United States*, 98 U. S. 145, 154; *Thompson v. Utah*, 170 U. S. 343, 347.

<sup>7</sup> That Art. III., Sect. 2, Cl. 3, applies, see *United States v. Dawson*, 15 How. 467, 487; *Cook v. United States*, 138 U. S. 157, 181.

<sup>8</sup> 11 How. 437.



the court based its decision very briefly upon this among other grounds.<sup>1</sup> Many years afterwards, in *Amer. Publishing Co. v. Fisher*,<sup>2</sup> the question was treated as an open one; but later still, in another case reported at the end of the same volume, the court again declared distinctly that the amendment was binding in Utah,<sup>3</sup> and although the question was not strictly essential to the decision of the case, the court could hardly avoid an opinion upon it, because the sole foundation of its jurisdiction was a contrary opinion given in the Territorial court. Finally, in a very recent opinion upon the subject, the Supreme Court said:—

“That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question.”<sup>4</sup>

The protection to property outside of the States has given rise to much less discussion. In *Bauman v. Ross*,<sup>5</sup> referred to once before, the court assumed that private property could not be taken for public use in the District of Columbia without just compensation, and decided that the method of fixing the compensation in the case at bar was just. On the other hand, in the earlier case of *Mormon Church v. United States*,<sup>6</sup> which will be discussed more fully later, the court said that Congress would be restrained, but rather by the spirit of the Constitution than by any express provisions.

Besides the cases already cited, there are others in which dicta are found to the effect that the restrictions of the Constitution are not confined to the States;<sup>7</sup> and in the decisions relating to citizenship, under the Fourteenth Amendment, it is commonly assumed

<sup>1</sup> This case has since been cited by the Supreme Court as an authority to that effect in *Callan v. Wilson*, 127 U. S. 540, 550; *Thompson v. Utah*, 170 U. S. 343, 346; *Capital Traction Co. v. Hof*, 19 Sup. Ct. Rep. 580.

<sup>2</sup> 166 U. S. 464.

<sup>3</sup> *Springville v. Thomas*, 166 U. S. 707. Fuller, C. J.: “In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common cases, and the Act of Congress could not impart the power to change the constitutional rule.”

<sup>4</sup> *Thompson v. Utah*, 170 U. S. 343, 346. See also the language already quoted from *Capital Traction Co. v. Hof*, 19 Sup. Ct. Rep. 580.

<sup>5</sup> 167 U. S. 548.

<sup>6</sup> 136 U. S. 1.

<sup>7</sup> *Murphy v. Ramsay*, 114 U. S. 15, 44; *Wong Wing v. United States*, 163 U. S. 228, 238. That the limitations of the Constitution apply to the Territories is assumed in *Scott v. Sandford*, 19 How. 393, both in the opinion of Chief Justice Taney (pp. 449-450), and in the dissenting opinion of Mr. Justice Curtis (p. 614.)

that a person born in the Territories is a citizen of the United States. This is clearly true of *United States v. Wong Kim Ark*,<sup>1</sup> where the court bases citizenship upon birth within the allegiance; and it is no less true of *Elk v. Williams*,<sup>2</sup> where the citizenship of an Indian was in question, for it nowhere appears whether he was born in a State or a Territory, and hence we may presume that the court considered it immaterial.

Against this array of authorities there is little to oppose. The question whether the limitations of the Constitution apply to the Territories was treated as an open one in *Benner v. Porter*,<sup>3</sup> and *Amer. Pub. Co. v. Fisher*.<sup>4</sup> But of course these cases are not authorities against a theory which they do not controvert, and upon which the court has since pronounced a favorable opinion. The case of *Mormon Church v. United States*<sup>5</sup> is more important, for there Mr. Justice Bradley said: —

"Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

This dictum is certainly an authority of a certain weight against the current of opinion; but its force is much weakened by the dissent of three of the judges,<sup>6</sup> and is pretty well destroyed by the case of *Thompson v. Utah*, where it is, in fact, cited by the court as supporting the principle that the limitations of the Constitution are operative in the Territories.<sup>7</sup>

The recent case of *Endleman v. United States*,<sup>8</sup> in the Circuit Court of Appeals, which sustains the constitutionality of an Act of Congress forbidding the importation, manufacture, and sale of liquor in Alaska, is often cited as an authority against the application of the limitations to the Territories. But the opinion hardly warrants that interpretation. It is clearly settled that a State,

<sup>1</sup> 169 U. S. 649.

<sup>2</sup> 112 U. S. 94.

<sup>4</sup> 166 U. S. 464.

<sup>3</sup> 9 How. 235, 242.

<sup>5</sup> 136 U. S. 1, 44.

<sup>6</sup> In the dissenting opinion, Chief Justice Fuller says: "In my opinion Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, expressed or implied, in that instrument."

<sup>7</sup> 170 U. S. 343, 349.

<sup>8</sup> 57 U. S. App. 1; 86 Fed. Rep. 456.



under its police power, can forbid the manufacture of liquor and the sale at retail, in spite of provisions for the protection of property similar to those in the Constitution of the United States; and a State could forbid its importation also were it not for the control over commerce by the United States. Now the federal government possesses in the Territory both the national and the local authority, and hence although the limitations of the Constitution may apply, it can forbid the importation, manufacture, and sale of liquor altogether. This is all that it was necessary for the court to decide, and the language of the judge does not seem to justify the belief that he intended to decide anything more.<sup>1</sup>

There is one well established doctrine which is commonly supposed to militate against the extension to the Territories of the restrictions in the Constitution. It is that the territorial courts are not courts of the United States within the meaning of the article on the judicial power. This doctrine is put upon the ground that "the jurisdiction with which they are invested, is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."<sup>2</sup> The doctrine has no connection with the

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<sup>1</sup> After rehearsing the reasons advanced for holding the Act invalid, the court said: "The answer to these and other like objections urged in the brief of counsel for defendant is found in the now well established doctrine that the Territories of the United States are entirely subject to the legislative authority of Congress. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation exclusively of the legislative department and subject to its supervision and control. *Benner v. Porter*, 9 How. 235, 242. The United States having rightfully acquired the territory, and being the only government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, Federal and State. *Insurance Co. v. Canter*, 1 Pet. 511, 542; *Cross v. Harrison*, 16 How. 164, 193; *National Bank v. Yankton Co.*, 101 U. S. 129, 133; *Murphy v. Ramsey*, 144 U. S. 15, 44; *Mormon Church v. U. S.*, 136 U. S. 1, 42, 43; *McAllister v. U. S.*, 141 U. S. 174, 181; *Shively v. Bowlby*, 152 U. S. 1, 48. Under this full and comprehensive authority, Congress has unquestionably the power to exclude intoxicating liquors from any or all of its Territories, or limit their sale under such regulations as it may prescribe. It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. Whether the subject elsewhere would be a matter of local police regulation, or within State control under some other power, it is immaterial to consider. In a Territory all the functions of government are within the legislative jurisdiction of Congress, and may be exercised through a local government, or directly by such legislation as we have now under consideration."

<sup>2</sup> *Amer. Ins. Co. v. Canter*, 1 Pet. 511, 546; *McAllister v. United States*, 141 U. S. 174, and cases cited.

protection accorded to individual rights by the Constitution. It merely leaves to Congress the same freedom in the organization of the judiciary as in that of the executive and legislature, of a territory. That it is not inconsistent with the protection of the people of the Territories by the bill of rights, and by other constitutional limitations upon the power of Congress, is shown by the fact that Chief Justice Marshall, in the very case in which it was first asserted, declared that the inhabitants of Florida enjoyed the privileges, rights, and immunities of citizens of the United States; and held in *Loughborough v. Blake*<sup>1</sup> that the provision requiring duties, imposts, and excises to be uniform throughout the United States, applied to the Territories as well as to the States.

It would seem, therefore, that the overwhelming weight of judicial authority sustains the proposition that, except for the provision regulating the organization of the courts, the limitations in the Constitution extend to the continental territory ceded to the United States by France, Spain, and Mexico. We have still to consider whether this is due to the form in which those cessions were made, or whether all possessions of the United States, however acquired, are of necessity in the same position. The treaty for the cession of Louisiana provided in Article III.: —

“The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States.”

And the treaty with Spain for the cession of Florida, which Chief Justice Marshall said admitted its inhabitants to the enjoyments of the privileges, rights, and immunities of citizens, contained a similar clause.<sup>2</sup> It may be suggested that these provisions were not meant to confer any immediate rights upon the inhabitants of the country ceded, but were intended merely to provide for the admission of States to be formed out of that country in the future. To this it can be answered that, although such an interpretation of the clause is certainly possible, the other construction, which was put upon it by Marshall, has not been questioned; and it is not necessary for

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<sup>1</sup> *Op. cit.*

<sup>2</sup> Art. VI. The inhabitants of the territories which His Catholic Majesty cedes to the United States, by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.



the purpose of this argument to show that these treaties necessarily conferred the rights of citizenship, but merely that they were susceptible of that construction, and have in fact received it.

The treaty of Guadalupe Hidalgo, whereby, according to Cross v. Harrison,<sup>1</sup> California was made a part of the United States, was even more full in its terms. It provided that persons in the ceded districts might remain Mexicans, or acquire the title and rights of citizens of the United States if they preferred to do so;<sup>2</sup> and that in the latter case they should "be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution."<sup>3</sup> Moreover it referred to "the limits of the United States, as about to be established by the following article;"<sup>4</sup> and spoke "of the territories, which, by the present treaty, are to be comprehended for the future within the limits of the United States."<sup>5</sup> The same form was followed six years later in the treaty for the Gadsen Purchase, where "the Mexican Republic agrees to designate the following as her true limits with the United States for the future;"<sup>6</sup> and where the provisions of the Treaty of Guadalupe Hidalgo, giving the inhabitants the rights of citizens of the United States, are expressly referred to and adopted.<sup>7</sup> Finally the treaty with Russia for the cession of Alaska provided that the inhabitants who preferred to remain in the ceded territory, "with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States."<sup>8</sup>

All the treaties for the acquisition of territory on the continent of North America have therefore provided that the people should be incorporated into the union, or admitted to the rights of citizens, and some of them have professed in terms to extend the limits of the United States. The joint resolutions for the annexation of Hawaii may, perhaps, have the same effect, for they declare that the islands "be and they are hereby annexed as a part of the territory of the United States." But the recent treaty with Spain makes no such provision. It merely cedes Porto Rico and the Philippines to this country without any stipulation in regard to the relation in which

<sup>1</sup> 16 How. 164.

<sup>2</sup> Art. IX.

<sup>3</sup> Art. XI.

<sup>7</sup> Art. V.

<sup>2</sup> Art. VIII.

<sup>4</sup> Art. IV.

<sup>6</sup> Treaty of June 30, 1854, Art. I.

<sup>8</sup> Treaty of June 20, 1867, Art. III.

the islands or their inhabitants shall stand towards the United States. In fact, the ninth article — after providing that Spanish subjects, natives of the Peninsula and residing in the ceded territory, may preserve their allegiance to the Crown of Spain or renounce it — substitutes for the clause in earlier treaties that in the latter case they shall acquire, or be admitted to, the right of citizens of the United States, the provision that they shall be held “to have adopted the nationality of the territory in which they may reside;” and adds, “The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.” Hence it is clear that if the government can acquire possessions without making them a part of the United States, it has done so in this case.

Upon the question whether such a course is legally admissible or not, no light can of course be obtained from the language of the original Constitution, because it did not contemplate any enlargement of territory at all, and naturally does not prescribe or suggest on what terms an acquisition should be made. The wording of the Thirteenth Amendment and the history of its enactment are, however, significant. As introduced into the Senate the first article of this amendment read simply: —

“Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States”;

but the Committee on the Judiciary reported it in its present form: —

“Sect. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

In view of the universal popular use of the term United States, to include both States and Territories, and of the judicial sanction which that usage had received, it does not seem probable that the last seven words were added to cover the Territories. What, then, was their object? In the debate upon the Amendment in the House of Representatives I can find nothing about its wording, and in the Senate nothing that explains its meaning. Mr. Sumner<sup>1</sup> objected to the form used, and preferred a far less forcible expression drawn from one of the French Revolutionary constitutions. It ended with the expression “everywhere within the United States and the juris-

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<sup>1</sup> Cong. Globe, April 8, 1864, p. 1482.



diction thereof." "The words in the latter part," he said, "supercede all questions as to the applicability of the declaration to States." What he meant by this I cannot conceive, for no one has ever doubted that the term United States included at the least all the States. In replying to him, Mr. Trumbull, the Chairman of the Committee, said he did not know that he should have adopted the precise words used, but that after some difference of opinion the majority of the Committee thought them the best words.<sup>1</sup> He did not, however, explain what the difference of opinion had been, or why the amendment was given its present form. Perhaps some member of the Committee is now living who could tell why the last seven words were added. But in the absence of such evidence, a reason may be suggested. On their face, these words contemplate the existence of places not within the United States, but subject to their jurisdiction. Now the Act of August 18, 1856, had provided that guano islands discovered by citizens of this country "may, at the discretion of the President, be considered as appertaining to the United States." How many of these islands were in our possession in 1864 I do not know, but a circular of the Secretary of the Treasury issued five years later, on February 12, 1869, enumerates sixty-nine such islands or groups of islands, and as they were all between the equator and fifteen degrees of north latitude, and would therefore offer a natural temptation to the use of slave labor, the Committee may very well have them in mind.

So much for the light shed by the Constitution itself upon the question whether possessions can be acquired without making them a part of the United States. The judicial authority upon the subject is somewhat meagre. The earliest opinion touching the subject has already been quoted. It is that of Mr. Justice Johnson in the Circuit Court, in *Amer. Ins. Co. v. Canter*,<sup>2</sup> where he said that present and future States, together with the Territory possessed at the adoption of the Constitution, were the sole objects of that instrument, and formed the limits over which it was to operate. The government of any other acquisition was, he thought, "left to the legislative power of the Union, so far as that power is uncontrouled by treaty." That territory might be so ceded by treaty as to become a part of the United States he did not deny; but he asserted that if this were not done it would not come within the operation of the Constitution. In the Supreme Court, Chief Justice

<sup>1</sup> Cong. Globe, April 8, 1864, p. 1488.

<sup>2</sup> Pet. 511, 517, note.

Marshall, while sustaining the decision of the Circuit Court, seems to have disagreed with it about the effect of the treaty of cession, for he thought its terms were such as to admit the inhabitants of Florida to the enjoyment of the rights of citizens of the United States. Upon Mr. Justice Johnson's statement that apart from treaty such a result would not follow he expressed no opinion, merely saying, "It is unnecessary to inquire, whether this is not their condition, independent of stipulation."

An analogous question arose in *Fleming v. Page*,<sup>1</sup> which decided that a vessel sailing to Philadelphia from Tampico, after its occupation by our troops in the Mexican war, was liable to pay duties, on the ground that Tampico was a foreign port within the meaning of the tariff laws, although subject for the time to the sovereignty of the United States. In delivering the opinion of the court, Chief Justice Taney said: <sup>2</sup> "As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union. . . . The boundaries of the United States, as they existed when the war was declared against Mexico, were not extended by the Conquest," because this could be done only by the treaty-making power or the legislative authority; and he went on to point out <sup>3</sup> that English authorities were of no value because the question was one where "our own Constitution and form of government must be our only guide." In short, he drew a distinction between national possessions from the point of view of international law, and incorporation into the United States, the latter being accomplished only by legislation or by treaty. It would clearly have made no difference, according to the principle enunciated in the opinion, if Tampico had been occupied by our troops for an indefinite period, or if the sovereignty over it had been ceded by a treaty which did not make it a part of the United States.

The relation between the operation of the Constitution and the jurisdiction of the government was presented in a different form in the case of *In re Ross*.<sup>4</sup> Here the court decided that a statute regulating capital trials before a consular court, under the treaty with Japan, was not unconstitutional on account of failing to provide for an indictment and a trial by jury. The court said: —

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<sup>1</sup> 9 How. 603.

<sup>3</sup> Id. 618.

<sup>2</sup> Id. 615-616.

<sup>4</sup> 140 U. S. 453, 464.



"By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guarantees it affords against accusation of capital or other infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad."

In other words, the court held that although the legislative power of Congress might extend beyond the limits of the United States, the limitations imposed upon legislation for the benefit of individuals did not accompany and restrain it.

The doctrine to be deprived from these cases is not altogether unopposed by authority. In the *Dred-Scott* case Chief Justice Taney remarked: <sup>1</sup>—

"A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form."

But the political circumstances under which this dictum was uttered deprived it of most of its weight.

It may also be objected that in *United States v. Wong Kim Ark*<sup>2</sup> the court based citizenship upon birth within the allegiance; but the question whether the nation could hold possessions which were not a part of the United States, so that persons born in them would not be citizens within the meaning of the Fourteenth Amendment, was not before the court, and there is nothing in the opinion to suggest that it was present in the minds of the judges.

One would suppose that the question might have arisen in a definite and concrete form in connection with the guano islands, but although these islands have been in court on more than one occasion,<sup>3</sup> the judges have refrained from giving an opinion on their constitutional status. In the last of these cases, however, the court in deciding upon a claim to dower in the right to exploit the island, remarked,<sup>4</sup> "Congress has not legislated concerning any civil rights

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<sup>1</sup> 19 How. 393, 448.

<sup>2</sup> 169 U. S. 649.

<sup>3</sup> *Petrel Guano Co. v. Jarnette*, 25 Fed. Rep. 675; *Jones v. United States*, 137 U. S. 202; *Duncan v. Navassa Phosphate Co.*, 137 U. S. 647.

<sup>4</sup> 137 U. S. 647, 651.

upon guano islands ; but has left such rights to be governed by whatever laws may apply to citizens of the United States in countries having no civilized government of their own " — a somewhat strange expression if the court considered the island an integral part of the United States.

The authority upon this question is certainly meagre, but the weight of it, such as it is, inclines decidedly to the view that, apart from treaty or legislation, possessions acquired by conquest or cession do not become a part of the United States. It follows that the incorporation of territory in the Union, like the acquisition of territory at all, is a matter solely for the legislative or the treaty-making authorities, although it may, of course, happen, where the language of a treaty or statute is ambiguous, that the court is obliged to interpret its meaning.

The theory, therefore, which best interprets the Constitution in the light of history, and which accords most completely with the authorities, would seem to be that territory may be so annexed as to make it a part of the United States, and that if so all the general restrictions in the Constitution apply to it, save those on the organization of the judiciary ; but that possessions may also be so acquired as not to form part of the United States, and in that case constitutional limitations, such as those requiring uniformity of taxation and trial by jury, do not apply. It may well be that some provisions have a universal bearing because they are in form restrictions upon the power of Congress rather than reservations of rights. Such are the provisions that no bill of attainder or ex post facto law shall be passed, that no title of nobility shall be granted, and that a regular statement and account of all public moneys shall be published from time to time. These rules stand upon a different footing from the rights guaranteed to the citizens, many of which are inapplicable except among a people whose social and political evolution has been consonant with our own.

*Abbott Lawrence Lowell.*

Boston, May, 1899.



## THE KING'S PEACE IN THE MIDDLE AGES.

(S. C. = STUBBS, SELECT CHARTERS, 8th ed. 1895.)

ALL existing civilized communities appear to have gone through a stage in which it was impossible to say where private vengeance for injuries ended and public retribution for offences began, or rather the two notions were hardly distinguished. First, revenge approved as no more than adequate, or disapproved as excessive, by rough public opinion, and, even when deemed legitimate constantly leading to reprisals and fresh feuds; next, revenge limited by customary rules and tempered by the alternative of accepting compensation of a fitting amount; then a rule compelling the injured party, or his kindred if he was slain, to be content with compensation on the proper scale if duly tendered and secured; then the addition of punishment, or substitution of punishment for compensation, turning the avenger into a prosecutor who must hand over the business of execution to public authority; finally the staying of the private avenger's hand, and the repression of crime by direct application of the power at the disposal of the State: all this may be seen, or more or less distinctly traced, in the history of criminal jurisdiction and law in many lands, and is abundantly exemplified in our own.

We find it already established in the eleventh century<sup>1</sup> that the king reserves a certain number of the greater crimes for his own jurisdiction. In the twelfth century the list is considerably increased, and may be said to include all serious offences against the person other than open manslaughter, and also highway robbery, besides breaches of the king's special protection, false moneying, and other contempts of his authority.<sup>2</sup> The omission of homicide in general, so strange to modern ways of thinking, is accounted for by the fact that the rights of the kinsfolk were still supposed to be exercisable. Secret killing,<sup>3</sup> especially by poison or supposed

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<sup>1</sup> Cn. ii. 12 (Wessex), 15 (Danelaw).

<sup>2</sup> Ll. Hen. c. 10. This text, as printed, reckons "*furtum morte impunitum*" among pleas of the Crown; but it is clear from Glanv. xiv. 8 that ordinary thefts were left to the justice of the County Courts.

<sup>3</sup> "*Murdrum enim idem est quod absconditum vel occultum*," Dial. Sc. I. C. 10. So for Glanvill (xiv. 3) murder is that kind of homicide which is done in secret, so that the slayer cannot be followed with hue and cry.

witchcraft, for to this the name of murder seems at first to have been attached, could easily be reserved for the king's peculiar jurisdiction because the ancient process of an actual or commuted blood-feud, assuming as it did that the facts were notorious or at least easily verifiable, had no adequate means of dealing with such cases. But there can be little doubt that the anomaly of leaving open homicide to the kindred and the popular courts was already obsolete in practice by the time when the list in question was set down by an antiquary who perhaps would not have approved the innovation. Murder, indeed, had acquired the curious transitional meaning of a homicide committed by an unknown person for which the hundred had to pay a fine because the slain man was presumed to be a Frenchman, or more frequently, by a compendious technical usage, the fine itself.<sup>1</sup>

These claims on behalf of the Crown were quite consistent with the lords of private jurisdictions having power of criminal justice extending in many cases even to life and death. Indeed their exercise of such powers could be justified only by the highest theory of the king's power. It was because the king had them himself, to begin with, that he could grant them over to any great lord whom he chose to favour. On the whole the practical result was that the pursuit of serious crime was taken away from the old local courts and came under the control of the king's judges and officers.

The precise manner in which this was brought about is under the cloud which envelops most of the details both of Anglo-Saxon institutions and of their transition to Anglo-Norman forms. But it is certain that early in the twelfth century the compiler of the so-called laws of Henry I. represented the old system of blood-feud, tempered by acceptance of wergild and a very moderate amount of royal interference, as still in force; while in the last quarter of the same century, at latest, we find that the greater crimes have acquired the Norman name of felony; the prosecution of them is conducted, under the name of "appeal," by the persons who under the older law might have taken up the feud, but the procedure is under the king's authority as soon as started, and cannot be dropped without leave; the mode of trial, where the fact is denied, is by the Anglo-Norman judicial combat (or, from the early part of the thirteenth century onwards, by the verdict of a jury at the option

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<sup>1</sup> See Maitland, P. C. for the County of Gloucester, xxix; and examples in the text *passim*.



of the accused); and the conclusion, if the accused be proved a felon by failing in the battle or by verdict, is the sentence and execution of public justice. One grim piece of archaism remained far into the middle ages to mark the original place of tribal or family revenge. "By the ancient law," said Tirwhit, one of Henry IV.'s judges, in 1409, "when one is hanged on an appeal of a man's death, the dead man's wife and all his kin shall drag the felon to execution." "That has been so in our own time," added Chief Justice Gascoigne.<sup>1</sup>

• As to the name of the proceeding, "appeal" originally meant accusation. In its application to disputing the judgment of a court, it meant not seeking the judgment of a higher court, as it has come to do in modern times, but charging the judges personally with giving a wilfully false judgment, or the witnesses with perjury. The charge might in either case have to be made good by combat, and down to the end of the twelfth century this was a possible course in all inferior courts.<sup>2</sup> Solemn acts of authority must stand, right or wrong; a judgment once made in due form is as the law of the Medes and Persians, which altereth not. You may have, at most, a personal remedy against individuals who have abused their office. A power vested in one court to reverse or vary the judgment of another was not within the conception of early English or Frankish law. Such a notion is of slow and comparatively modern growth in England. The modern usage of the word "appeal" as implying this notion seems to be not older than near the end of the thirteenth century, and to occur first, as might be expected, with reference to ecclesiastical procedure.<sup>3</sup>

To return to what concerns us at present, it was well understood in the thirteenth century that the criminal "appeal" was no longer a mere act of private vengeance. The king had to be satisfied for the breach of his peace as well as the aggrieved party for the injury. Hence, as Bracton expressly tells us, the death or default of the appellor did not make an end of the proceedings. On the contrary, the effect was to send the accused to be tried by a jury without the option of battle. The king takes up the charge on behalf of his own peace, as he well may and ought, for the words of the

<sup>1</sup> Y. B. 11 Hen. IV. 12, pl. 24.

<sup>2</sup> Glanv. viii. 9. A much more elaborate practice, which does not concern us here, was developed in the 13th cent., see P. and M. ii. 666.

<sup>3</sup> See the quotations *s. v.* in the Oxford English Dictionary, and cp. P. and M. ii. 661.

appeal are that the act complained of was done "wickedly and in felony against the peace of our lord the king." And the accused may not offer to defend himself by his body, "since the king fights not, nor has none other champion than the country." Thus it only remained for the accused to put himself on a jury, no other mode of proof being possible.<sup>1</sup> But in this matter, as we shall presently see, Bracton and his masters were too enlightened for their age; and their sensible practice had to give way to an almost incredible combination of pedantry and barbarism.

Meanwhile the old public justice, applicable to cases where there could be no question of blood-feud — practically, that is, to theft — was becoming the king's justice too. The men of the hundred who charged a suspected offender on the strength of their own knowledge, or of common fame, now acted under the direction of the king's officers; and the withdrawal of religious sanction from the ordeal by the Church in 1215 brought the further proceedings under the same authority by the downright need of some new regulation. The action of the Lateran Council was promptly enough<sup>2</sup> acknowledged by the king's calling for appropriate measures. It seems likely that the ordeal was already discredited. In the twelfth century clerical narrators not only exalted the merits of the saints by whose intercession men were miraculously healed after having failed in the ordeal and suffered as felons, but almost went out of their way to assert the victim's innocence, though the miracle might well enough have been represented as the reward of an offender's subsequent contrition. The so-called judgment of God was now regarded as a possibly oppressive or fraudulent judgment<sup>3</sup> which might call for supernatural redress. On the other hand the temporal power was not disposed to regard acquittal on a trial by ordeal as conclusive in the prisoner's favour. A man of bad repute who had been sent "to the water" on a charge of murder or other grave crime by the witness of the county was not treated as innocent by the later twelfth-century practice. Under Henry II.'s ordinance, he had to leave the kingdom and be content not to forfeit his goods.<sup>4</sup> A mode of trial so little respected had

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<sup>1</sup> Bract., fo. 142 b.

<sup>2</sup> In 1219, P. and M. ii. 650, Thayer, Preliminary Treatise on Evidence, 69.

<sup>3</sup> See the case of Ailward, Bigelow Pl. A. N. 260, Materials for Hist. St. Thomas (Rous series), i. 156, ii. 171. For a similar case where the trial had been by battle, cp. Maitland, P. C. for Gloucester, 142.

<sup>4</sup> Assizes of Clarendon (1166), c. 14, and of Northampton (1176), c. 1.



become untenable. When ordeal was put out of the way, to all seeming unregretted by any one, there was no method of final proof to set in its place other than the new and royal method of inquest. If the accusing body had been turned into the final judges of the fact, some sort of inquisitorial procedure would probably have been the result, and the Grand Jury might have become an official staff with a Public Prosecutor at its head. But the law maintained the old view that the indictment, as from this point we may begin to call it, was only the voice of common fame, which was enough to put a man in jeopardy but not to condemn him. The prisoner was entitled to call for a final vote of the lawful neighbours, to "put himself on the country." The same men might now be asked for their definite opinion, but they were reinforced by jurors of another hundred and of four townships. If the combined jurors declared that they positively thought the prisoner guilty, he stood condemned. Only in the middle of the fourteenth century were members of the jury of indictment prohibited from serving on the jury of trial.<sup>1</sup>

It will be observed that the new process is brought into play, in point of form, by the prisoner's action. He is not sent to a jury as he would have been sent to the ordeal; he puts himself upon its verdict. Before long the question arose what was to be done with a prisoner who would not put himself on the verdict of a jury in the case of either an appeal or an indictment; this is not a question directly before us now, but it was inevitable and gave much trouble. When the "judgment of God" by ordeal ceased to be available it seemed, on the whole, to the medieval English mind that the prisoner—except where the facts were too manifest to need further proof—could not be required, as matter of strict right, to submit himself to any form of human judgment. Bracton, as we saw, was bold on the side of common sense in the case of an appeal; as to an indictment he only says it seems the prisoner can be compelled to defend himself by the country for want of other manner of proof. Some bold and enlightened judges, probably Bracton among them, were prepared to dispense with consent or enter a fictitious consent to be tried by a jury on the prisoner's behalf.<sup>2</sup> But the formalist view prevailed: namely that trial by the

<sup>1</sup> Thayer, *Preliminary Treatise*, 82, 83.

<sup>2</sup> Case from Warwickshire Eyre, A. D. 1221. *Select Pleas of the Crown*, ed. Maitland (Seld. Soc.), No. 153. Appeal of murder brought by widow against one Thomas. She is adjudged disqualified because she has married again and the second

country could not be without the prisoner's submission, but refusal to submit was an independent offence, in the nature of contempt of the king's authority, for which the recusant might be punished in any manner short of death: imprisonment, rigorous imprisonment under conditions barely compatible with living, or, as the practice appears to have been settled in the course of the fourteenth century, with aggravations amounting to death in fact though not in terms. In this way respect for the letter of the subject's rights and dread of usurping jurisdiction led the judges to the clumsy and barbarous expedient of the *peine forte et dure*, which, to the law's disgrace, remained possible, and was sometimes put in force, down to quite modern times.<sup>1</sup> But, strange as were the limitations imposed by the logic of thirteenth-century lawyers on the king's jurisdiction, the jurisdiction had in substance come to the king's hands. What remained in Bracton's time of the old system of private and vindictive prosecutions became absorbed in one or another of the new varieties of civil procedure devised by the clerks in the king's chancery and sometimes by the judges themselves.

We have mentioned the exceptional case — perhaps not so very exceptional in days when open violence was frequent — of a crime being too manifest for any formal proof to be required. A few words of explanation must now be added. For more than a century after the Conquest, and much later in some local jurisdictions, the stern rule of the popular courts against open and notorious crime held its ground. A criminal taken red-handed was not entitled to any further defence or trial before the king's justices, whether he were a murderer with his bloody weapon or a robber with his stolen goods, "seised" as men then said "of the murder or theft," so that the fact was undeniable before the lawful men who apprehended him. This was deliberately confirmed as late as 1176:<sup>2</sup> and the jurisdiction, as long as it existed, remained with the county court save in the case of crimes

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husband makes no appeal; "et ideo inquiratur veritas per patriam. Et Thomas defendit mortem set non vult ponere se super patriam. Et xij juratores dicunt quod culpabilis est de morte illa, et xxiiij milites alii a predictis xij ad hoc electi idem dicunt, et ideo suspendatur." Similar process in a case of theft, in same eyre, No. 157. The verdict of a jury reinforced by a second jury of double their number was apparently taken as equivalent to ocular proof.

<sup>1</sup> P. and M. ii. 649; Stephen, Hist. Cr. L. i. 298, 299; Thayer, Preliminary Treatise,

74.

<sup>2</sup> Assize of Northampton, art. 3, S. C. 151.



specially reserved for the Crown. In the Gloucestershire records of 1221 we read that certain evil-doers slew a servant of the Bishop of Bath in his master's house. Four men charged with the killing were taken with stolen goods, the murder having, it seems, been incidental to theft or housebreaking. Records show this as a very common state of things: and, as there was nothing more to be lost by adding murder to robbery, already a capital offence, we need not be surprised. The men admitted the death, and were summarily hanged, not for the murder, which was not within the county court's jurisdiction, but for the manifest theft, which was.<sup>1</sup> The same rule was applied by the king's judges to manslaughter, down to the middle of the thirteenth century.<sup>2</sup> It was not necessary that the judgment should be rendered immediately, but only that the damning circumstances of the offender's arrest "*super factum*" should be promptly recorded by good witness. The written records of such cases are of a simplicity befitting the summary character of the proceeding: "Wakelin Ralph's son slew Matilda Day with a knife, and was taken thereupon with the knife all bloody; and this is witnessed by the township and twelve jurors, and so he cannot deny it; let him be hanged; he had no chattels."

An important exercise of the king's increasing control over criminal business was the constitution or definition (it is not certain which, nor very material) of the office of coroner in 1194.<sup>3</sup> The most important function of the coroner was from the first the holding of inquests on the bodies of persons who had died by violence or accident, or in circumstances giving rise to

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<sup>1</sup> Maitland, P. C., for the County of Gloucester, No. 280 (A. D. 1221). *Magna Carta* had already forbidden inferior courts to hold pleas of the Crown; it would seem that summary disposal of a "hand-having" thief was not deemed a *placitum* at all.

<sup>2</sup> Bracton, fo. 137; Note Book, No. 138; P. C. for County of Gloucester, No. 394, where we have the form of judgment by the king's judges in such a case: "*consideratum est quod ipse non potest defendere et ideo suspendatur.*" The twelve jurors mentioned here and in the similar case No. 174 (translated in our text) are an accusing body, not the final judges of the fact, that is, they are more like a grand than a petty jury as we understand those terms. What Bracton calls the "violent presumption" takes the place of any further proof or trial. Sir James Stephen's comment (*Hist. Cr. L. i. 260*) is rather misleading, as its language ignores this distinction.

<sup>3</sup> *Præterea in quolibet comitatu eligantur tres milites, et unus clericus custodes placitorum coronæ*, "*Judicial Visitation*," art. 20, S. C. 260; Gross, *Introduction to Select Coroners' Rolls*, Seld. Soc. 1896. The phrase "*custodire placita coronæ*" was in use earlier; the doubt is how much of the significance given to it in 1194 was new.

suspicion; and that function continues to this day as part of the machinery of our criminal law, side by side with the jurisdiction of justices of the peace and to some extent overlapped by it, but not superseded. In the Middle Ages the coroners also exercised judicial powers in criminal and sometimes in civil business, which did disappear, partly under the express prohibition of Magna Carta, whereby neither the coroners nor the county court were to hold pleas of the Crown,<sup>1</sup> partly by disuse as the office of a justice of the peace was brought into working order. They supervised the execution of capital justice in the privileged jurisdictions of lords who had that franchise, and thus had more extensive rights than the sheriff, who, by the terms of such local privileges, was excluded from interference within their bounds. Being the king's officers, but elected by the men of the county, the coroners formed a direct link between the Crown and the people and a check on the intermediate lords.<sup>2</sup>

Within a year of the creation or better settlement, whichever it was, of the office of coroner, we hear of knights being assigned in each county to take an oath of all men over fifteen years of age for the maintenance of the king's peace and the effectual pursuit of evil-doers.<sup>3</sup> The relation of these keepers of the peace to the sheriff and the coroners (if indeed they were always different persons from the coroners) is not very clear. However, they were the predecessors of the conservators of the peace first appointed under authority of Parliament in 1327, and known as justices of peace (we now say 'of the peace,' but the shorter form was the common one down to the eighteenth century) from the time, about a generation later, when distinctly judicial functions were conferred on them by further legislation. The office of justice of the peace is the most ancient of which it can be said that its powers and duties are wholly derived from statutes.

For more than two centuries after the Conquest the king's peace itself was liable to interruption by the death of the reigning king. It perished with him; the new king was not deemed to be fully king, nor so styled, until he had been crowned; and

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<sup>1</sup> C. 24. This was not held to apply to summary and interlocutory business. Cp. as to the county court p. 182, above, and see Bracton, 150 *b*.

<sup>2</sup> Gross, *op. cit.* xxv.-xxx.

<sup>3</sup> S. C. 264. And see Const. Hist. c. 15.



during this interregnum there was no power available to preserve order but the resources of the old popular jurisdiction, doubtless more and more enfeebled by the diminution of their importance in normal times. Evil-doers were not slow to seize such an opportunity when it came. We read in the *English Chronicle*, under the date of 1135, that on the death of Henry I. "there was tribulation soon in the land, for every man that could forthwith robbed another." But when Edward I. succeeded to the throne in November 1272, being then far away from England on the crusade, the danger and inconvenience of allowing such an interregnum were perceived to be intolerable; and the king's council forthwith caused his peace to be proclaimed throughout the kingdom, declaring the reason in his name in these words: "for rendering justice and keeping of the peace we are now and henceforth"—not merely after coronation—"debtors to all and sundry folk of this realm."<sup>1</sup> It must have seemed a bold measure at the time, but its wisdom was so manifest that it was not merely accepted as a temporary and extraordinary remedy, but became a conclusive precedent for all future demises of the Crown. The doctrine of the king's peace being put in suspense by the king's death does not seem to have been ever heard of again.

One reason for the ease with which the reform was made may perhaps have been that its omission would have thrown the machinery of justice out of gear more extensively and conspicuously than at any previous time. The writ of trespass was fast coming into use in the course of Henry III.'s reign. During the twenty-two years between the middle of the century and his death it became common.<sup>2</sup> We think of an action of trespass nowadays as a purely civil remedy, a means of recovering damages if the plaintiff succeeds; and that was no doubt its main object and advantage even from the first. But it was also a penal and semi-criminal proceeding, and preserved traces of this character down to modern times. The trespass was complained of and dealt with as a punishable breach of the king's peace, and the plaintiff was bound to allege force and arms and breach of the peace in order to give the king's court jurisdiction; without those words it was only a matter for the county court. In fact this action was, in its original form, closely connected with the distinctly criminal procedure by way of "appeal" for felony. One might almost regard

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<sup>1</sup> S. C. 448.

<sup>2</sup> P. and M. ii. 525-6.

it, using the analogy of modern French procedure, as the civil side of such an appeal, which became separated by some ingenious experiment or happy accident, and started on a new career of its own. To regard the king's peace as capable of temporary suspension in 1272 would have been to deprive suitors of a remedy which was already becoming popular, and showing the first promise of its vast future developments. It belongs to another context and a later period to see how forms of action derived from the semi-criminal writ of trespass became the most ordinary and efficient instruments of purely civil justice in dealing with questions of property and contract.

It will be observed that there was no centralized authority, as indeed there still is none, for dealing with the prevention or detection of crime. Royal justice aimed not at superseding local administration, but at controlling and stimulating it. The work of the king's officers in every department of public law, and of the local officers and courts who were bound to assist them, was kept up to a generally uniform standard by the periodical journeys of the king's itinerant judges. The more general and searching visitations have to be distinguished from the minor judicial delegations. There were frequent missions of learned persons charged only to dispose of certain kinds of pending causes and matters, usually the "assizes" introduced in Henry II.'s time, and developed in the course of the thirteenth century, for the recovery of land from wrongful possessors. Judges might even be sent out to take only one particular named case, under a special commission as we should now call it.<sup>1</sup> Their authority depended on the terms of the commission in each case, as the authority of justices of assize does to this day; the difference is that the commissions of justices of assize (who superseded the justices in eyre at a later time, and must not be confounded with them) have run in a fixed form for centuries, whereas the heads or articles of the eyre were subject to variation. Some sort of routine, however, was acknowledged early in the thirteenth century. More especially there was a general and comprehensive mission with unlimited jurisdiction and a wide administrative authority to see that the Crown got its dues of every kind, which took place at intervals of some years in every

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<sup>1</sup> Bracton, fo. 111. This was of course possible independently of the clause of Magna Carta which led to the commission of assize properly so called, and, as I read Bracton, it was a known thing in the earlier practice. And see "Circuits and Assizes" by Mr. G. J. Turner, in 3 *Enc. Laws of Eng.* 26.



part of the country. This may conveniently be called a general eyre; it involved a rigid scrutiny of the criminal records of the county since the last visitation, and commonly produced a good many fines. These, and the burden of entertaining the justices and their retinue, caused the advent of a general eyre to be anything but welcome. Attempts were made to establish a custom not to have it in the same place more than once in seven years.<sup>1</sup> On these occasions the county court was summoned, but acted in the subordinate capacity of giving information and deputing its chief men to talk over business with the judges, and, we may well suppose, to be instructed by them in the latest royal improvements of procedure and finance.<sup>2</sup> The men of the county were answerable for having all the Crown's business properly brought before the itinerant justices; and that business would include everything, from forfeitures of felons' goods to complaints of sales by unauthorized measure or petty extortions by bailiffs. Directly or indirectly, there was always an eye to the king's dues. As Mr. Maitland says, "a distinction between the doing of penal justice and the collection of the king's income is only gradually emerging. The itinerant judge of the twelfth century has much of the commissioner of taxes."<sup>3</sup> Failure to find criminals, what with murder-fines and amercements for failing to produce one's townsmen, was more fruitful of revenue than judicial sentences. Unpleasant as the whole process was for the country-side, for it was a costly forced purchase of justice at best, there must have been a great deal of civic education in it.

So far we have only hinted at the transformation of the jury in criminal cases from a special commission of inquiry into a regular and necessary tribunal, and from a piece of superior administrative machinery into a popular and representative institution. Many details are still obscure, but we know that the process was substantially completed about the middle of the thirteenth century. What interests us just here is to observe that nothing but the king's power, half consciously guided by the necessities of the time, could have accomplished this. There were no means available for reforming the hopelessly antiquated procedure of the old popular courts, and indeed there was still, in the modern sense, no

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<sup>1</sup> Stubbs, C. H. c. 15, § 235.

<sup>2</sup> S. C. 358; Bract. 115 b; Maitland, *Pleas of the Crown for Gloucester*, xxiv.

<sup>3</sup> *Op. cit.* xxvi.

legislature at all. Executive and judicial authorities, under the king's direction, had to innovate for themselves in the lines of least resistance. As early as 1166,<sup>1</sup> the old accusation by the common report of the country-side became a "presentment" by definite persons representing the local knowledge of all classes, who were bound to inform the king's judges or the sheriff. In our time the Grand Jury no longer consists of twelve of the more lawful men of the hundred and four of the more lawful men of every township; but it still exists, it is still called a Grand Inquest as its most official and solemn name; the foreman is sworn "as foreman of this Grand Inquest for our Sovereign Lady the Queen and the body of this county." The form of the oath still binds the grand jurors to present any crimes undiscovered by the officers of the law which may come to their notice otherwise than by being expressly given them in charge; that is, to accuse any one whom they suspect of having committed a crime even if no one has taken steps to prosecute him; and though there is no occasion to do this in modern times, grand juries not unfrequently make presentments of what they conceive to be the opinion of the county as to the increase or decrease of criminal offences, or desirable amendments of the criminal law in substance or administration. It is to be remarked that the form of the oath is not of Anglo-Saxon or popular, but of Frankish and official origin.<sup>2</sup> There was nothing about the procedure in any way repugnant to popular tradition or habits; nevertheless it was new, royal, and in ultimate parentage exotic. Not the pretence of an impossible freedom from foreign elements, but the power of assimilating exotic material to serve its own purposes and to be leavened with its own constant spirit, was already, as it has ever since been, the real glory of our Common Law. Sometimes it is asked, what is the use of a grand jury nowadays? The question ought, perhaps, rather to be whether the saving of a little trouble and expense would be an adequate compensation for abolishing a dignified and at worst harmless function which has been part of the machinery of justice in England for more than eight centuries. However, the grand jury is sometimes able to stop an obviously malicious or frivolous prosecution and spare an innocent person the pain and scandal of going into the dock.

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<sup>1</sup> *Assize of Clarendon*, Stubbs, S. C. 143.

<sup>2</sup> See *L. Q. R.* ix. 278-9.



The petty jury acquired its modern position, that of a body of judges appointed to decide on the facts according to the evidence and not otherwise, only by a gradual process. As regards the criminal jury we still know little of the details. In the fifteenth century the functions of jurymen were coming near their present character; in the sixteenth we have a description of the course of a trial which, but for the prisoner not being allowed to employ counsel against the Crown, would be accurate in all essentials at this day. Sir Thomas Smith,<sup>1</sup> writing chiefly for the information of learned foreigners, insists on the public and oral character of the procedure, a matter of commonplace to Englishmen but strange to men living under systems derived from the later Roman law. "All the rest" (except the written indictment) "is done openly in the presence of the judges, the justices" [of the peace], "the inquest, the prisoner, and so many as will or can come so near as to hear it, and all depositions and witnesses given aloud, that all men may hear from the mouth of the depositories and witnesses what is said." As has already been hinted, there was nothing about the origin or the early forms of the jury, or in particular of the criminal jury, to make it in any sense a popular institution. There was no manifest reason why it should not become a mere instrument of official power, as indeed the Tudor sovereigns and their ministers tried to make it in affairs of state. There was no obvious probability that the verdicts of juries would be just, or independent, or free from corruption. Indeed they were far from satisfying all these conditions in the disorderly times of the later Middle Ages. No one could even have assigned any definite reason, down to the fourteenth century, why a jury should not hold a private inquiry out of Court; and while the procedure was unsettled, there were one or two practices tending that way which might conceivably have become the model instead of first being exceptional and then disappearing. But the national instinct for publicity prevailed. The most Norman and the most royal element in the machinery of justice became a security against royal encroachment, a bulwark of freedom so beloved of Englishmen that pious fable ascribed its introduction to the hero-king Alfred.

*Sir Frederick Pollock.*

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<sup>1</sup> Commonwealth of England, Bk. 2, Ch. 26.

CONCLUSIVENESS OF DECREES OF A  
DOMESTIC PROBATE COURT IN  
MASSACHUSETTS.

IT has often been asserted that a probate court is in the nature of things an inferior court. Chief Justice Redfield said in his criticism of the decision of the New York Court of Appeals in *Roderigas v. East River Savings Institution*: "There is no controversy, we believe, or has been none hitherto, that courts of probate, whose jurisdiction is created and defined by statute, for the settlement of estates, within particular defined districts, must be regarded both as inferior courts and of special and limited jurisdiction, and that no presumption could be made in favor of their jurisdiction beyond what appeared on the face of their proceedings, and that even where that appeared regular, it might be contradicted in any collateral proceeding, and the whole action of the court rendered nugatory and void for all purposes."<sup>1</sup>

The probate court in Massachusetts is not a court of statutory origin. By the Province Charter of 1691, jurisdiction in probate matters was vested in the governor and council, who exercised it according to the course of the ecclesiastical law, within the several counties, through a surrogate appointed by them and styled Judge of the Probate of Wills and the Granting of Letters of Administration. To these probate courts thus constituted in the several counties the provincial legislatures from time to time annexed jurisdiction in other matters, over which they were, or were assumed to be, by the charter competent to legislate. Upon the adoption of the State constitution, the probate court so constituted originally, and with jurisdiction so extended to new matters, was recognized as an existing institution of the State to be continued.<sup>2</sup> In *Peters v. Peters*,<sup>3</sup> in which it was argued that *certiorari* would not lie to a probate court, Chief Justice Shaw said: "It is urged

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<sup>1</sup> 75 A. L. Reg. N. S. 213; see also 3 Redfield on Wills, 58; to the same effect, *Fowle v. Coe*, 63 Me., at p. 248.

<sup>2</sup> Fuller's Probate Laws, 346, and authorities there cited.

<sup>3</sup> 8 Cush. 538.



as a consideration lying at the foundation of this argument, that a court of probate is a judicial court of inferior jurisdiction, a proposition which we think may well be called in question, regarding it in the sense in which it is used in the argument. In the relation which a court of original jurisdiction bears to an appellate court it is inferior and subordinate to this court as the Supreme Court of Probate. . . . But in our view the court of probate, like the ecclesiastical courts of Great Britain, to which it has constant reference, is a court of peculiar jurisdiction, having a separate and exclusive jurisdiction over an important class of subjects, particularly wills, administration, and the settlements of the estates of deceased persons." Beyond this, there is no case in which it has been held to be an inferior court. As to some matters its jurisdiction is special; but this is true of all our courts.

There is a probate court for each county in the Commonwealth. Each of these courts is now technically a court of record, and has original jurisdiction in the county for which it is constituted "of the probate of wills, of granting administration of the estates of persons who at the time of their decease were inhabitants of or resident in the county, and of persons who die out of the Commonwealth leaving estates to be administered within the county; of the appointment of guardians of minors; of all matters relating to the estates of such deceased persons and wards; of petitions for the adoption of children and for the change of names; and of such other matters as have been or may be placed within their jurisdiction by law.<sup>1</sup>

The court has original jurisdiction in equity of all cases and matters relating to the administration of estates of deceased persons, or to wills or trusts created by will, and in the exercise of such equity jurisdiction is expressly declared by statute to be a superior court.<sup>2</sup> It would seem to be a necessary consequence of making the court superior on its equity side, that it is superior on its probate side; for if its decrees in the exercise of the latter jurisdiction may be collaterally attacked, a similar attack may be made on decrees passed in the exercise of the former jurisdiction, inasmuch as it can only act on the equity side as to estates of which it has jurisdiction on the probate side. It would therefore seem to be necessary, in order to give effect to the declaration of the statute, to hold that the court is as to all matters

<sup>1</sup> Pub. Sts. c. 156, § 2.

<sup>2</sup> St. 1891, c. 415.

a superior court. Proceeding according to the course of the ecclesiastical law, its jurisdiction within its territorial boundaries over the estates of decedents is practically unlimited, the sole limitation being the exclusion of estates within the county belonging to decedents whose domicile was in some other county of the Commonwealth. This limitation is practically unimportant, and no more extensive in its nature than that attached to the jurisdiction of the ancient superior courts of Westminster. On principle, therefore, it is submitted, the probate courts of Massachusetts are courts of superior jurisdiction.<sup>1</sup>

Still, it has been decided that, while the decrees of probate courts made in the exercise of their jurisdiction are conclusive upon the common-law courts,<sup>2</sup> and cannot be reversed by writ of error or *certiorari*, nor set aside in equity, even for fraud,<sup>3</sup> there is no presumption in favor of jurisdiction beyond what appears by the record, and jurisdictional fact appearing on the record may be collaterally assailed. In the latter respect the decrees of the probate court are accorded less credit than the judgments of a justice of the peace or of a board of health.<sup>4</sup> As to the lack of presumption in support of the record, it has been held that the decree of a probate court granting letters of guardianship over an insane person is void, unless it appears by the record that notice was given the subject of the decree, and that an adjudication of his insanity was made.<sup>5</sup> A decree of partition is void if the record does not disclose notice to or appearance by an interested party.<sup>6</sup> A decree of partition is also void when it does not appear thereby

<sup>1</sup> It may be added that probate courts of other States with no greater extent of jurisdiction than those of this Commonwealth have been held to be superior courts. *Grignon v. Astor*, 2 Har. 319, 341; *McNitt v. Turner*, 16 Wall. 352, 366; *Comett v. Williams*, 20 Wall. 226, 249; *Veachy v. Rice*, 131 U. S. 298; *Davis v. Hudson*, 29 Minn. 27; *Plume v. Howard Savings Bank*, 146 N. J. L. 211; *The People v. Gray*, 72 Ill. 343; *Grier v. Hunt*, 6 Humph. (Tenn.) 131; *Kimball v. Fisk*, 39 N. H. 110.

<sup>2</sup> *Brown v. Wood*, 17 Mass. 68; *Litchfield v. Cudworth*, 15 Pick. 30; *Bassett v. Crafts*, 129 Mass. 513; *McKim v. Doane*, 137 Mass. 195; *Pierce v. Prescott*, 128 Mass. 140; *Loring v. Stedman*, 1 Met. 207.

<sup>3</sup> *Waters v. Stickney*, 12 Allen, at p. 3.

<sup>4</sup> *Foley v. Haverhill*, 144 Mass. 353; *Hall v. Staples*, 166 Mass. 402.

<sup>5</sup> *Chase v. Hathaway*, 14 Mass. 222; *Wait v. Maxwell*, 5 Pick. 219; *Hathaway v. Clark*, 5 Pick. 490; *Allis v. Morton*, 4 Gray, 63; *Conkey v. Kingman*, 24 Pick. 118. In the latter case, the letter of guardianship was held to be *prima facie* evidence of the appointment of the guardian, but the invalidity of the appointment was established by the silence of the record as to notice and the insanity of the ward.

<sup>6</sup> *Smith v. Rice*, 11 Mass. 507.



that a sum of money awarded by the commissioners to make the partition just and equal has been secured.<sup>1</sup>

As to contradicting collaterally jurisdictional facts set out in the record, the cases are as follows: It may be shown that a grant of administration was made more than twenty years after the death of the intestate, in contravention of the statute. "When the question," said Parsons, Ch. J., "is whether the court of probate has jurisdiction of the subject or not, he must decide it, but at his own peril. If he errs by assuming a jurisdiction which does not belong to the probate court, his acts are void."<sup>2</sup> It was early held that a decree of administration setting forth that the intestate was domiciled at the time of his death in the county for which the court making the decree was constituted, might be collaterally avoided by proof that the domicile of the intestate was in some other county. This led to the statutory provision that "the jurisdiction assumed in any case by the court, so far as it depends upon the place of residence of a person, shall not be contested in any suit or proceeding, except in an appeal in the original case, or when the want of jurisdiction appears on the same record."<sup>3</sup> The statute, however, does not extend to cases in which jurisdiction depends upon the existence of assets of the deceased within the county.<sup>4</sup> A decree adjudging the personal property of a decedent to be insufficient to pay debts, and authorizing a sale of the real estate for that purpose, may be collaterally attacked on the ground that there were no unpaid debts for payment of which the real estate was subject to be sold.<sup>5</sup>

A decree granting letters of administration is *prima facie* evi-

<sup>1</sup> Thayer v. Thayer, 7 Pick. 209; Jenks v. Howland, 3 Gray, 536. In Chase v. Hathaway, 14 Mass. 227, Chief Justice Parker, speaking of the importance of preserving full records of notice and other proceedings in the probate office, said: "It is all the more important, as any material defect will render the proceedings null, at any period, when they shall be brought in question."

<sup>2</sup> Wales v. Willard, 2 Mass. 124.

<sup>3</sup> Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 5 Pick. 20; Holyoke v. Haskins, 9 Pick. 259; Rev. Sts. c. 83, § 12.

<sup>4</sup> Harrington v. Brown, 5 Pick. 519.

<sup>5</sup> Heath v. Wells, 5 Pick. 139; Lawson v. Smith, 4 Allen, 359; Aiken v. Morse, 104 Mass. 277; Tarbell v. Parker, 106 Mass. 347. But see now St. 1874, c. 346, § 2. These cases may be supported on another ground, namely, that if the real estate is freed from the lien of the creditors, the title is absolutely in the heirs, and the court has no more authority to decree its sale than it has to order the sale of land of a stranger. See Conrad v. Wapples, 96 U. S. 279; Risley v. Phoenix Bank, 83 N. Y. 318.

dence only of jurisdictional facts.<sup>1</sup> The probate court has jurisdiction to set out an estate of homestead in cases where the right to it is not disputed by the heirs or devisees. A decree setting out such an estate may be avoided by plea and proof that the right was disputed. "We understand the principle to be well settled," said Dewey, J., "that if the probate court exceeds its jurisdiction, and makes a decree upon a matter in which it has no jurisdiction, such decree is held utterly and absolutely void and of no effect, and may be so treated in any collateral proceeding, if such want of jurisdiction is shown."<sup>2</sup> A grant of administration upon the estate of a living person is void.<sup>3</sup> The opinion of the court in so deciding goes upon the ground that the death of the alleged decedent is a jurisdictional fact, the truth of which may be attacked collaterally.<sup>4</sup>

In *O'Herron v. Gray*,<sup>5</sup> one question was as to the validity of a decree of a probate court authorizing the guardian of minors to transfer certain shares of stock. The decree was made on a petition in the name of the guardian, and signed "Catherine O'Herron, Guardian by E. S. Francis." The decree was attacked collaterally on the ground that Francis had no authority from the guardian to petition in her name, and that the proceedings were had without notice to the guardian or the wards, and without their knowledge. In holding the decree to be void, Mr. Justice Knowlton, speaking for the court, said: "But above all, the probate court acquired no jurisdiction of the case as against the plaintiffs. No case nor any proper party was ever before the court in regard to the sale of the stock. The unauthorized signature and appearance of Francis availed nothing as against the plaintiffs or their guardian. This conflicts with the established rule in common-law proceedings. Subject to exceptions not material to this point, neither the plaintiff nor the defendant in an action at law can collaterally attack the judgment rendered therein, on the ground that the proceedings were begun or defended without authority from or notice to him."<sup>6</sup> It is

<sup>1</sup> *Pinney v. McGregory*, 102 Mass. 186; *Crosby v. Leavitt*, 4 Allen, 410; *Harrington v. Brown*, 5 Pick. 519; *Day v. Floyd*, 130 Mass. 488; *Newman v. Jenkins*, 10 Pick. 515.

<sup>2</sup> *Mercier v. Chace*, 9 Allen, 242; *Woodward v. Lincoln*, 9 Allen, 239.

<sup>3</sup> *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87.

<sup>4</sup> The true ground is want of due process of law. In such a case it appears on the face of the proceedings that the supposed decedent was not made a party, that they were had between other parties, and from their nature did not contemplate notice to him, and that there was no seizure of the estate antecedent to the decree which would operate as notice. *Scott v. McNeal*, 154 U. S. 34.

<sup>5</sup> 168 Mass. 573.

<sup>6</sup> *Finneran v. Leonard*, 7 Allen, 54; *Hendricks v. Whittemore*, 105 Mass. 24.



true that the decision is on an agreed statement of facts, the effect of which was to waive the right if such existed, to insist on the conclusiveness of the decree of the probate court;<sup>1</sup> but this is not alluded to in the opinion, and apparently it was intended to accept the doctrine that the probate court is not competent to settle any collateral fact of a jurisdictional nature.<sup>2</sup>

It thus appears that the common law of England as to the conclusiveness of judgments of inferior courts involving a question of jurisdiction has been applied in all its severity to the decrees of the Massachusetts courts of probate, although they clearly are not in the technical sense inferior courts. The reason for this is similar to that given by Lord Coke for refusing to accord credit to the decrees of the Court of Chancery proceeding according to the course of equity; namely, that "no writ of error, but an appeal to certain delegates, doth lie." "No writ of error lies to the probate court," said Jackson, J., in *Smith v. Rice*.<sup>3</sup> "Their proceedings not being according to the course of the common law, a party situated like the present demandant has no means of revising the decree, and causing it to be annulled or reversed, so as to prevent its being produced against him in another cause. He has then a right, when it is so produced, to aver and prove its nullity."<sup>4</sup> "The cases all assume," said Shaw, Ch. J., in *Peters v. Peters*,<sup>5</sup> "that a decree, which in other courts would be voidable, shall be held wholly void, because it cannot be re-examined and reversed in a common-law court, by a common-law process, but only in the Supreme Court of Probate on appeal." There appeared to be no adequate way of correcting errors and superseding erroneous decrees. "One of the strong reasons for holding the question of jurisdiction not concluded," said Dewey, J., in *Jochumsen v. Suffolk Savings Bank*,<sup>6</sup> "is that the only opportunity for reversing or modifying a decree of the court of probate is the limited one of

<sup>1</sup> See *Sykes v. Keating*, 118 Mass., at p. 520.

<sup>2</sup> Other probate cases holding decrees void fall within the rule applicable to the judgments of all courts, that when want or excess of jurisdiction appears affirmatively by the record, the proceedings are void. *Hunt v. Hapgood*, 4 Mass. 117; *Sumner v. Parker*, 7 Mass. 79; *Dawes v. Head*, 3 Pick. 142; *Hancock v. Hubbard*, 19 Pick. 167; *Cowdin v. Perry*, 11 Pick. 51; *Verry v. McClenner*, 6 Gray, 535; *Harmon v. Day*, 105 Mass. 33; *Conant v. Newton*, 126 Mass. 105; *Brown v. Doolittle*, 151 Mass. 595; *Newell v. Peaslee*, 151 Mass. 601; *Thayer v. Winchester*, 133 Mass. 447.

<sup>3</sup> 11 Mass. 513.

<sup>4</sup> *Certiorari* will not lie. *Peters v. Peters*, 8 Cush. 544.

<sup>5</sup> 8 Cush. 544.

<sup>6</sup> 3 Allen, 95.

an appeal to be taken within thirty days after the same is made, or where, through mistake, the party has omitted to do so, and this court, upon petition and cause shown, allows the appeal to be entered within one year."

This reason disappeared in the light of the decision made in 1865 in *Waters v. Stickney*,<sup>1</sup> where it was held that the probate court has power to "correct errors arising out of fraud or mistake in its own decrees." "This power," said Chief Justice Gray, in the case cited, "by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be conclusive upon other courts." A party injured by a decree of a probate court has opportunity in a proper case, at any time, to cause the decree to be annulled or revoked, so as to prevent its being employed against him. He may apply to the probate court, and if his application is refused, may appeal to the justices of the Supreme Judicial Court sitting as the Supreme Court of Probate. This remedy is as ample as that of a writ of error. Accordingly there would appear to be no longer any ground for holding that the conclusiveness of the decrees of a probate court involving a question of jurisdiction is to be tested by the common law of England applicable to the judgments of an inferior court. And it may be observed that, inasmuch as the decrees of the courts of probate involve to a very great extent questions of title, the considerations of policy which exempt the judgments of superior courts of common-law jurisdiction from collateral attack, within the bounds which have been indicated, more imperatively require the same exemption in the case of the decrees of the probate courts. Yet as late as 1890 Mr. Justice William Allen said, in *Brown v. Doolittle*,<sup>2</sup> "Error does not lie to the court of probate, and when its decree is erroneous, it may not only be collaterally impeached by plea and proof, but it will be set aside by the court on the application of a person interested in the estate, and injuriously affected by the decree."

All our courts subordinate to the court of last resort are now, it would appear, in effect, on the same footing with respect to direct attack upon their judgments and decrees. On writ of error to courts both of general and of limited jurisdiction, proceeding according to the course of the common law, errors of fact going to

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<sup>1</sup> 12 Allen, 1; *Gale v. Nickerson*, 144 Mass. 415.

<sup>2</sup> 151 Mass. 600.



the jurisdiction may under our statutes be assigned.<sup>1</sup> On *certiorari* to a court exercising a special authority, questions of jurisdiction may be tried.<sup>2</sup> On bill or petition, jurisdictional findings by courts proceeding in equity or in probate causes may finally be reversed; in the one case by the Supreme Judicial Court on its equity side, in the other by the Supreme Court of Probate. The general rule that a judgment of a domestic court proceeding according to the course of the common law cannot be impeached collaterally by parties or privies for want of jurisdiction of the person, is expressly put upon the ground that the remedy by writ of error is more appropriate.<sup>3</sup> On the same ground, it must be generally true that the judgment of such a court is not collaterally assailable for want of jurisdiction of the cause unless the defect appears on the face of the record. And there is no apparent reason why the same exemption from collateral attack should not attach to the judgments and decrees of courts proceeding otherwise than according to the course of the common law, inasmuch as the errors of such courts may be corrected by direct process as far reaching as a writ of error.<sup>3</sup>

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<sup>1</sup> Pub. Sts. c. 187, § 3. But if the attacking party has had notice of the original action, and the jurisdictional fact disputed was or might have been tried therein, he cannot raise the question on writ of error. *Raymond v. Butterworth*, 139 Mass. 471. The principle of this, it is apprehended, applies in *certiorari*, and also, except where fraud is alleged, to an application to a court of equity or of probate to revoke its decree.

<sup>2</sup> *Heyward, Petr.*, 10 Pick. 358; *Ex parte Mayor of Albany*, 23 Wend. 277; *Whitney v. Board of Delegates*, 14 Cal. 479.

<sup>3</sup> *Hendrick v. Whittemore*, 105 Mass. 34.

## NEW JERSEY AND THE GREAT CORPORATIONS.<sup>1</sup>

WITH the increase of business prosperity there has come within a few months past a very great increase in the number of large corporations. This increase has come not by the growth of old companies, but through the combination of small companies into large ones. In many of the leading industries of the country manufacturers have abandoned the struggle of competition and have united their interests in a large corporation, to which they have surrendered all their property and business, to be operated under a common head and for a common purpose. The result of this has been an enormous aggregation of capital and the control of vast industries in the hands of a few organizations.

The large amount of the nominal capital, the great volume and extent of the business controlled under one management, and the rapid increase in the number of large combinations has caused alarm and aroused opposition among the people, and a strong demand is made that something shall be done by the states and the national government to restrict this power of combination and restore the benefit of free competition. "Anti-Trust" is already becoming a political watchword, and the discussion of the question is likely soon to be disturbed by the passions of political contests.

On the one side, there is the increasing tendency of capital toward large combinations for the purpose of diminishing the expense of operation and avoiding competition, and on the other hand there is the undefined but very real fear on the part of the people of the growing power of wealth and of the concentration of the control of great industries in a few hands, the suppression of small dealers, the control of the markets, and the consequent power to raise prices. This fear has expressed itself in legislation against "Trusts" and "Combinations," and in many states severe restrictions are placed upon all corporations that combine in any way for the purpose of avoiding competition, reducing production, or fixing the prices of commodities.

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<sup>1</sup> An address delivered before the American Bar Association at Buffalo, August 28, 1899.



It is expressing itself more loudly in the utterances of political leaders and popular agitators, and more effectually in the decisions of the courts sustaining the validity of these statutes, and declaring that combinations to prevent competition or to fix prices are illegal at common law as in restraint of trade.

At the same time, and apparently in spite of all these things, the tendency to concentration increases, and when agreements of combination among several corporations are declared illegal, they all turn their property over to a new corporation with enormous capital, and this, without resorting to any unlawful agreement, simply exercises the right of property, and by means of its vast wealth controls the business more effectually than was ever done by means of the combination under the name of a trust.

The remedies devised against combinations in the form of agreements and trusts seem to be inapplicable to the combinations that consist in the actual merger of existing corporations, or in the formation of companies which merely exercise the common right of purchase of various properties and the good will of many business enterprises.

And yet, although the legal form be different, the practical result of the transaction remains the same. There is the same aggregation of capital, the same combination of many individual enterprises under one control, the same avoiding of competition, and the same tendency toward what is commonly called monopoly. The political and economic results are practically the same, and it is evident from the manifold expressions of popular opinion that the people well understand that the result is the same. The resistance to this tendency to the centralization of industrial enterprises will be continued and new means will be sought for checking the tendency, even though it is working through the forms of existing law. The struggle between the two principles of individualism and co-operation will continue, and the question whether the best results are to be obtained by competition or by combination will be fought out until one prevails over the other, or a new and composite result is obtained.

This is a question of political economy, but at the bottom it is the conflict between two social desires; and as Chief Justice Holmes, of Massachusetts, has lately said,<sup>1</sup> the law is after all but the expression of the prevailing social desire, and courts and lawyers,

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<sup>1</sup> HARVARD LAW REVIEW, March, 1899.

therefore, have to deal with these questions; and we must at least have some knowledge of what these desires are, and we must be familiar with the tendency of the statutes and decisions in which these desires are expressed.

I do not propose to attempt to discuss this difficult subject as a whole. It has been discussed in many pamphlets and text-books, and has been considered in various aspects in judicial decisions, and it will, no doubt, be the theme of many political speeches during the next few years. It has seemed to me, however, that it might be interesting to this Association to hear some discussion of the policy adopted on this subject by the state that is commonly said to have done more than any other to enable this tendency to go on thus far under the forms of law, — the state which first permitted the forbidden "Trusts" to establish themselves under the form of corporations, and has given legal existence to some of the greatest industrial and mercantile combinations of the country.

The "Trusts" having been declared illegal in New York as combinations in restraint of trade, transferred their property to corporations organized under the laws of New Jersey; and during the last ten years companies have been formed under the laws of that state under which the properties and business of corporations in all parts of the country have been united under one management, with capital stock of many millions, and the combinations thus formed have accomplished all the purposes of those that had been declared illegal in New York.

In the report of the Committee of the Senate in New York upon the investigation of "Trusts," there was cited as an example the fact that a combination owning factories in several states, including New York, but without any semblance of any interest in New Jersey, secured a charter there and assumed to carry on its business in New York free from compliance with the beneficial restrictions of her laws.

The fact that New Jersey permitted corporations to hold the stock of other corporations enabled any combination organized under the form of a "trust" to avoid the penalties imposed upon contracts in restraint of trade by simply causing a corporation to be formed in New Jersey, and to purchase the stock and so control the property and business of all the companies concerned in the "trust;" and so it has come about that New Jersey destroyed the effect of the drastic measures taken elsewhere to stop the growth of great combinations of capital, and the number and extent of



such combinations have increased until now, when the notorious Whiskey Trust, which has been attacked with every possible weapon of offence in many states, has lately been organized under the laws of New Jersey as a corporation with a capital stock of one hundred and twenty-five millions, owning the property and business of nearly all the distilleries in the country; and the Federal Steel Company has formed under the same laws a consolidation of the steel and iron industries of the United States, and is the largest steel company in the world.

A list of the largest industrial corporations formed within the past few months shows in a striking manner to what a very large extent New Jersey is responsible for the existence, under the forms of law, of great combinations of capital for controlling the industries of the country.

Thirteen hundred and thirty-six corporations were organized under the laws of New Jersey between the first of January and the first of August of the present year, with an authorized capital of over two thousand million dollars, and in a list of the existing industrial corporations having stock and bonds exceeding ten million dollars, sixty-one were organized in New Jersey as against sixty in all other states.

The following are some of the largest companies of this character organized under the laws of New Jersey during the current year: The Amalgamated Copper Company, with a capital of \$75,000,000; The American Woollen Company, with a capital of \$65,000,000; The American Hide and Leather Company, with a capital of \$75,000,000; The American Cycle Company, \$80,000,000; The National Tube Company, \$80,000,000; The American Steel and Wire Company, \$70,000,000; The National Steel Company, \$59,000,000; The American Smelting and Refining Company, \$70,000,000; The United States Worsted Company, \$70,000,000; The Rubber Goods Manufacturing Company, \$50,000,000; The American Ice Company, \$60,000,000; The Distilling Company of America, \$125,000,000; Federal Steel Company, \$200,000,000.

It is true that New Jersey is not the only state in which these large corporations have been formed. There are others which have offered great inducements to the formation of such companies. West Virginia and Kentucky have for a long time afforded especial facilities for the creation of companies intended to do business in other states, and Delaware has lately entered into active competition with the others. New York and many other states have

followed the example of New Jersey in adopting the important provisions permitting corporations to hold stock of other companies, and there are now few states in which corporations cannot be formed which would be capable of acquiring and controlling the property and business of other companies and forming combinations of the most formidable character. The fact remains, however, that New Jersey is the state in which the greatest number of the largest corporations are organized. I need not give in detail the reasons why they are not organized in other states. In some, the state fees on incorporation are very large, and the property represented by capital stock is assessed for taxes at a higher value than similar property of individuals. In others, there is a supervision of the business and the requirement of annual reports of the earnings or of the methods and results of the business, and there are some states in which the legislation against "trusts" and combinations is distinctly directed against corporations which in any way accomplish a similar result.

In view of the strong expression of popular and also of judicial opinion against the combination of corporations for the control of industries, it is evident that New Jersey must answer before the country for the policy by which she has permitted to be accomplished, under the forms of her law, a result which has been regarded by the courts and legislatures of many states as a serious menace to the social and political welfare of the people.

I propose, therefore, to trace briefly the course of the legislation and judicial decisions in New Jersey with regard to business corporations, and to point out some of the reasons why the protection of her laws is sought in the formation and management of the corporations which control some of the largest industrial and mercantile interests of the country.

And when I have done this, the question will remain whether the corporations thus formed under the laws of my own state are subject to the condemnation that has been pronounced against trusts and combinations in restraint of trade. I cannot attempt to discuss the subject on the economic or political side, but I wish to consider briefly the legal principles on which the condemnation is based, and see whether they apply to corporations which have acquired the property of rival companies, as well as to the combinations made by means of contracts which have been declared to be illegal as creating monopolies and as in restraint of trade.

The policy of encouraging the combination of capital for the



promotion of industries is not a new policy in New Jersey. As early as 1791, when public-spirited citizens of New York, Pennsylvania, and New Jersey determined to form a company for the purpose of establishing manufactures in this country, they came to New Jersey for their act of incorporation. It was through the influence and exertion of Alexander Hamilton that the plan was devised. It was a part of his plan of making a single and self-contained nation of the several states. The charter was drawn, or at least revised, by him, and on November 22, 1791, the Legislature of New Jersey passed an act to incorporate the "Contributors to the Society for the establishment of Useful Manufactures." The authorized capital was one million dollars, and the company was empowered to hold property to the amount of four millions. Five hundred thousand dollars were subscribed and over two hundred thousand paid in. The capital stock named was one million dollars. The Governor of the state was authorized to subscribe, in the name of the state, for shares to the amount of one hundred thousand dollars, and a lottery was authorized to be held for the purpose of raising one hundred thousand dollars more. The society was forbidden to go into general trade, but it was authorized to dig navigable canals and deepen rivers, with powers of condemnation, and given the right to take toll; and provision was made for the incorporation of the inhabitants of such district, not exceeding in area, thirty-six square miles, as the society should select, and this district was to become a town, with a mayor and aldermen, and was to bear the name of the great lawyer, William Paterson, who took part in framing the Constitutions and the Judiciary Acts of New Jersey and the United States. The site chosen was on the Falls of the Passaic, and the city of Paterson has been engaged for more than a century in useful manufactures, and her silk mills, her iron works and locomotive works, have contributed very largely to the development of the country at large; and, not neglecting political and legal affairs, she has lately given to the country its Vice-President and its Attorney-General.

It was not until 1846<sup>1</sup> that any general act was passed for the formation of business corporations, and this again was an act for the encouragement of manufactures. Special charters were granted by the Legislature to companies of various kinds, and general acts

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<sup>1</sup> Rev. Stat., p. 139.

had been passed providing for the incorporation of charitable and religious societies. There were statutes passed in 1817<sup>1</sup> and 1829<sup>2</sup> for the protection of creditors of incorporated companies. An act was passed in 1840<sup>3</sup> to prevent fraudulent elections, and there were various other general acts for the regulation of corporations, but the act of 1846 was the first to make a general provision for the aggregation of capital for the purpose of carrying on business without personal liability. This act is the basis of the statutes under which business corporations are now organized in New Jersey. The scope of the act was extended a little in a revision made in 1849,<sup>4</sup> and stockholders were relieved of joint and several liability for the payment in of the whole of the capital stock. The objects for which corporations might be formed under these acts were limited to manufacturing, mining, mechanical, and chemical business. It was required that statements of the debts and assets should be published annually. No debts could be contracted beyond the amount of the capital stock, and stockholders were made liable to repay any part of the capital that might be withdrawn. Directors were held liable for debts if they failed to file statements of the payment in of the capital stock. The business of the company must be carried on within the state, and the meetings of the directors, as well as of the stockholders, must be held there; but it was not required that any of the directors, except the president, should be a resident of New Jersey. Careful provision was made for the regulation of elections, and power was given to the Court of Chancery to appoint a receiver and distribute the assets in case of insolvency. It was assumed in this legislation that the activities of New Jersey corporations would be confined within the state, and it was not until 1865<sup>5</sup> that express provision was made that any company organized under the general law might carry on a part of its business outside of the state, and have one or more offices, and purchase and hold real and personal property outside of the state, on condition, however, that a statement to that effect were made in the certificate of incorporation. In 1866<sup>6</sup> it was declared that a dividend of the accumulated profits, reserving a working capital not exceeding half the amount of the capital stock, should be made every year, and

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<sup>1</sup> Laws 1817, p. 18.

<sup>2</sup> Laws 1829, p. 112.

<sup>3</sup> Laws 1840, p. 354.

<sup>4</sup> Laws 1849, p. 58.

<sup>5</sup> Laws 1849, p. 300.

<sup>6</sup> Laws 1866, p. 1034.



in 1872<sup>1</sup> it was required that a list of the officers and directors, with the residence of each, should be filed annually.

During all this time special charters had been freely granted by the Legislature, and companies of every kind had been formed. The Legislature was subjected to the influences of those who sought for special favors, and the statute books were burdened with private acts of incorporation. In 1873 the Legislature abandoned the policy of granting special charters to railroad companies, and passed an act by which any persons who chose to associate themselves together, and lay out a route and pay in the money required, should have power to build and operate a railroad anywhere within the state; and in 1875 the Constitution was amended so as to forbid the granting of special charters, and the Legislature was directed to pass general laws under which corporations should be organized and corporate powers of every nature obtained. In pursuance of the policy thus indicated, and even before the amendments proposed had been actually adopted, a general act was passed with a view to facilitating the organization of business companies and protecting the capital invested in them.<sup>2</sup>

The act was based upon the Act of 1846 as revised in 1849, relating to manufacturing companies and the existing acts regulating corporations in general. The scope of the act was extended so as to embrace not merely the various objects mentioned in the former statutes, but also "every lawful business or purpose whatever."

In most respects the provisions of the law were the same as those of the former statutes, but an important change was made in the omission of the requirement of the annual publication of a statement of the amount of capital stock actually paid in, of the existing debts, and of the assets of the company. This provision has been retained in many states, and is characteristic of their policy in dealing with corporations; but in New Jersey, where the purpose is the protection of stockholders and creditors, it was considered that the publication of such a statement might, under many circumstances, be disastrous to the business, and that such a requirement would not be tolerated with respect to the business of individuals. Provision was, therefore, made that stockholders should have access at all reasonable times to the books of the company, and they were given power to make such provisions as they thought fit in their by-laws for the regulation of the business;

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<sup>1</sup> Laws 1872, p. 27.

<sup>2</sup> Rev. Stat. 1875, p. 175.

but no compulsion was laid upon the company to make known to the public, or to its rivals, the precise condition of its affairs. The provision that the debts should not exceed the amount of the capital stock was repealed, and the liability of the directors for failure to file a certificate of the payment in of the capital stock was materially modified.

Provision was now made for the first time that the directors might issue stock in payment for property purchased, and in this act of 1875 appeared the provision which has made it possible for residents of distant parts of the country to associate themselves for business purposes as corporations under the laws of New Jersey. The act declared that, if the by-laws should so provide, the directors of any company might hold their meetings, have an office and keep the books, except the stock and transfer books, outside the state, on condition, however, that they should always maintain a principal office within the state and have an agent in charge thereof; and the Chancellor and Judges of the Supreme Court were empowered, upon good cause shown, to make a summary order for bringing any of the books within the state. It was only the meetings of the directors that could be held outside of the state, and this is so to-day. No permission has ever been given by any general statute to hold meetings of stockholders outside of the state, and the courts have held firmly to the principle that the organic action of the corporation itself in the meetings of its shareholders and the election of officers can only take place within the limits of the state.

It was the evident policy of the Legislature to make it easy to form corporations and to encourage the aggregation of capital for business purposes. No previous public notice was required. No petition need be presented to any official for leave to incorporate, nor was it made necessary, as in Pennsylvania, for example, to obtain letters patent from the Governor. No limit was placed upon the amount of the capital stock. No tax of any kind was imposed upon the franchise or privilege of incorporating. No tax was laid upon the capital stock, and it was declared that the real and personal estate of all corporations thereafter formed should be taxed the same as that of individuals. The purpose was to treat the property and business of corporations in the same way as that of natural persons, and the only restrictions imposed were such as were thought necessary for the protection of stockholders and creditors. Corporations were not considered as being hostile



in any way to public interests, and the regulations were intended for the protection of the persons interested in the companies rather than of the public.

No important changes in the corporation laws were made for many years. It was not until 1883<sup>1</sup> that any fee in the nature of a tax was required to be paid on filing a certificate of incorporation, and no change in this fee has been made since then. The payment required is twenty-five dollars on a capital stock of one hundred thousand dollars, and twenty cents for every one thousand dollars of additional stock. It was in 1884 that franchise taxes were first imposed upon corporations, and in this year it was provided that a certain annual tax, by way of license for their franchises, should be paid by all corporations except certain kinds enjoying special privileges, which were specially taxed. Manufacturing companies and mining companies carrying on business within the state were at first wholly exempt, but now these also are taxed, unless at least fifty per cent of their capital stock is invested in manufacturing or mining within the state. The tax is one-tenth of one per cent upon the capital stock up to three millions, and one-twentieth of one per cent upon the excess up to five millions, and fifty dollars for every million after that. This tax was imposed simply for the purpose of additional revenue, and the rates were made low in pursuance of the long-established policy of encouraging, rather than hindering, the aggregation of capital for the purposes, of business. The amount of the tax is based upon the amount of the capital stock, and nothing is left to the discretion of taxing officers, and the law has remained substantially unchanged ever since it was first enacted.

It was in 1888<sup>2</sup> that the Legislature first made provisions for corporations holding and disposing of the stock of other companies, but one of these was of doubtful meaning and the other was limited to certain companies, and it was not until 1893,<sup>3</sup> a year after a similar act had been passed in New York, that the general act was passed declaring expressly that it should be lawful for any corporation of the state of New Jersey to purchase, hold, and sell the stock or bonds of any other corporation in the same manner as an individual might do; but even before this it had already been the practice of corporations, under the advice of counsel, to purchase and

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<sup>1</sup> Laws 1883, p. 252.

Laws 1883, p. 385, 445.

<sup>3</sup> Laws 1893, p. 301.

deal in such stocks under the policy indicated in existing statutes and the general power to hold and deal in property of every kind, in the same manner as natural persons.

It was this power to acquire and hold the stock of other corporations that made it possible for corporations to be organized in New Jersey for the purpose of acquiring the stock of other companies of a similar character, and so to control their property and business, and to bring about under the form of corporate ownership the great combinations which, when produced by means of contracts, had been declared in other states to be in restraint of trade and contrary to public policy.

There was a further revision of the general corporation law in 1896.<sup>1</sup> The limit of fifty years to the duration of a corporation was removed, and provision was made for the creation of different classes of stock, with such preferences and voting powers as might be expressed in the certificate, debts in all cases having preference over preferred stock; and under this provision founders' shares (as they are called in England) may now be created. In 1897<sup>2</sup> acts were passed for the protection of the stockholders and officers of domestic and foreign corporations against suits within the state upon any personal liability arising under the corporation laws of other states. Still further changes were made in 1898.<sup>3</sup> The incorporators were authorized to define and limit the powers of the officers, directors, and stockholders so that the certificate should be not merely a record of the incorporation, but also have the nature of a charter controlling the action of its several parts. Stringent provisions were made to secure the maintenance at all times of a registered principal office, at a definite place within the state, with an agent always in charge thereof, on whom process may be served, and from whom information as to the affairs of the company may be obtained by all who are entitled to it; and companies so registered were relieved of the necessity of giving information to the tax assessors of other states of the actual residence of their directors and stockholders.

In 1899<sup>4</sup> an act was passed which facilitates combinations by declaring that thereafter it shall be lawful for any corporation, except railroad and canal companies, with the consent of two-thirds in interest of its stockholders, to lease its property and franchises to any other corporation.

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<sup>1</sup> Laws 1896, p. 277.

<sup>2</sup> Laws 1897, p. 124.

<sup>3</sup> Laws 1898, p. 407.

<sup>4</sup> Laws 1899, p. 334.



The statutes relating to conspiracy have a bearing upon the policy of the state with regard to combinations in restraint of trade. Under the Revised Statutes of 1846<sup>1</sup> it was a misdemeanor to combine or conspire to commit any act injurious to trade or commerce and the law remained unaltered on this point until 1892. Under a similar statute in New York combinations in restraint of competition were held to be illegal;<sup>2</sup> but in 1892 the act relating to conspiracy was amended in New Jersey so as to omit all mention of acts injurious to trade or commerce,<sup>3</sup> and it had already been declared that it should not be unlawful for workmen to bind themselves by agreement to persuade others to enter into combinations against entering or leaving an employment.<sup>4</sup>

At the risk of being tedious I have reviewed in some detail the course of legislation in New Jersey with regard to corporations, for the purpose of showing what the policy of the state has been with respect to the aggregation of capital for business purposes, and how it came about that capital from other states has sought the protection of her laws in the formation of corporations, with power to acquire and hold the stock of other companies, and unite under one control the property and business of many rival enterprises.

It has been asserted with some heat that New Jersey has encouraged foreign enterprises to be incorporated under her laws with a view to obtaining relief from the proper restrictions and obligations imposed by the laws under which they really belong, and it is suggested that it is only through ignorance of the uses to which it would be put that she has thus permitted her system to be abused.<sup>5</sup>

I think that a careful examination of the course of legislation and judicial decision in New Jersey will show that in dealing with the organization and regulation of corporations she has followed a consistent, definite, and progressive policy. This policy is different from that of many States. It is a policy of encouraging rather than discouraging the aggregation of capital. It regards the corporation as a means of bringing the savings of many into efficient use as capital for the development of resources and the promotion of industries. It treats the corporation as an association for the purpose of business, and deals with it as it deals with individuals and

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<sup>1</sup> Revised Statutes, 1846, Crimes, sec. 61.

<sup>2</sup> *People v. Sheldon*, 139 N. Y. 251.

<sup>3</sup> Laws 1892, p. 200.

<sup>4</sup> Laws 1883, p. 36.

<sup>5</sup> Report of the New York Senate Committee on Trusts, 1897, p. 21, 22.

partnerships in the conduct of their affairs. It adopts the principle that men, whether associated as partners or in joint-stock companies under the name of corporations, should be allowed all the liberty that is consistent with public safety and order; that freedom of contract is an essential part of the liberty of the citizen, and that the largest practicable freedom of the individual is for the best interest of the community.

In pursuance of this policy, the constitution has forbidden the granting of special privileges or franchises and the creation of corporations by a special act of the Legislature or patent from the Governor, and the laws have declared that any persons under certain conditions may form a corporation for any lawful purpose whatever. Special regulations are made for those that are given public franchises in the exercise of the eminent domain, or the use of the public streets, or those that occupy positions of trust like banks or insurance companies; but in regulating corporations formed for general business purposes the laws have been directed to the protection of stockholders and creditors, and to the security of the money invested rather than to the regulation of the business in the interest of the general public. It has been thought best to treat them as business enterprises, subject only to the inexorable laws of trade and to the restrictions that govern individuals in the conduct of their business affairs. The statutes, therefore, have made provisions by which the stockholders, in their certificate of incorporation, or in their by-laws, may define and limit the powers of the officers and directors, or may give them such ample powers as they may think necessary for the successful conduct of the business. Stockholders are given the right to inspect the books, with power to enforce it for proper purposes and in a reasonable manner. They may demand and have full reports from the directors of the condition of the business. An election must be held every year, and in every way the directors are responsible to the fullest extent to the stockholders and subject to their control; but no obligation is put upon an ordinary business company to make the condition of its affairs known to the public. It is only to stockholders and creditors who have a personal interest in the matter that the company is obliged to make known its condition; and, since the revision of 1875, there has been no law requiring statements of the debts and assets to be filed or published, nor have assessors been authorized to inquire into the earnings for the purpose of imposing a tax upon income.



It is largely because of this feature of the policy of New Jersey in dealing with corporations, and because the conduct and conditions of the business are treated as private and not public affairs, and are not made the subject of the scrutiny of the assessor, the curiosity of the public and the jealousy of rivals, that men engaged in large business enterprises, even though in other States, seek the protection of the laws of New Jersey.

With regard to taxation, the policy of New Jersey has been to make the burden moderate and invariable. No taxes at all were imposed upon corporations as such until 1884, and the burden then imposed was a definite tax at a moderate rate upon the amount of the capital stock actually issued, and the rate then fixed has remained unchanged ever since. It is not left with the assessors to determine the value of the franchise and the amount of the tax, and a company can count with certainty upon the amount of the tax both at the present time and in the future. The tax on property is levied as if it were held by individuals. It is a local and not a State tax, and the assessment is made upon the property itself and not on the capital stock.

The element of stability is an important characteristic of the laws governing corporations in New Jersey. Few changes have been made in the statutes during a long period, and these were made along the lines of development already laid down. The decisions of the courts also have been consistent and uniform. The courts have not been easily disturbed by sudden changes of public opinion with respect to corporations, and the bar has been able to rely upon an orderly development of legal principles governing corporate enterprises. Stability in legislation and judicial decision are an important inducement in the choice of a domicile for an organization which is to endure for an indefinite period, and, in view of the possibility of failure and the sudden end of the corporate life, it is also satisfactory for the parents of the enterprise to know that in case of dissolution it will have skilful treatment and decent burial. It is a fact of some importance in determining the location of a company in New Jersey that in case of insolvency, or on dissolution for any cause, the winding up of a corporation is in the hands of a Court of Chancery; and that this is but one court for the whole State, made up of judges set apart for dealing with cases in equity, and acting together with the Chancellor at the head, so that the policy and practice of the court are fixed and well known, and there is no conflict of local jurisdic-

tions with respect to injunctions and the appointment of receivers, and that this court is well known to consist of men of integrity and sound discretion well acquainted with the law.

These are some of the reasons why capitalists in other States organize corporations under the laws of New Jersey, and they are based for the most part upon the policy adopted by New Jersey with reference to corporations organized by her own citizens, and obviously without intention of drawing them away from other States. The chief points of difference in actual policy between New Jersey and a majority of the States relate to the supervision of the business in the interests of the public, and the modes and extent of State taxation. On both of these points the policy of New Jersey was established many years ago, and it was not until the opposite policy in other States had been carried so far as to become oppressive that persons began to seek the benefit of organization under the laws of New Jersey. I need not now discuss the question which of these two kinds of policy is the better from an economic point of view. It is enough to say that the policy of New Jersey was adopted with a view to the interests of her own people and the development of her own resources; and if it be found to be one that encourages the aggregation of capital for the promotion of industries in other parts of the country, this in itself is not sufficient reason for a change of policy on the part of New Jersey.

*Edward Q. Keasbey.*

[*To be continued.*]



# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

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By the death of Edward Winslow Fox of the third-year class on September the eighteenth the editorial board of this Review has been decreased and its efficiency lessened. And bitter as this loss is to us — his friends — it has a wider significance, for no young man ever gave greater promise of a valuable life. He entered the Law School full of the best academic honors from Harvard College, and in the School his work was of the highest quality. He seemed curiously fitted for the law: he was careful, firm, of sound judgment, — in manner direct, convincing, and of rare dignity, — in all eminently judicial. His friends knew him as a man of absolute integrity and of great personal attractiveness. He would, it seems, have been a power in any community in which he lived.

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THE LAW SCHOOL. — The Law School opens with a larger entering class than last year, — full statistics will appear in the December number. There are a few changes in the curriculum to record. Suretyship has become a two-hour course under the title of Suretyship and Mortgage. Massachusetts Practice will be given by Mr. E. R. Thayer in place of New York Practice. Damages, Patent Law, and Roman Law are omitted. Professor Ames has charge of Sales, and Assistant Professor Westengard of Property II. As was expected, Professor Williston resumes his class in Contracts after an interval of three years. Mr. Bigelow, LL.B., 1899, is assisting Professor Beale in Criminal Law. The Bail Courts for practice in pleading will be continued. Carriers and Admiralty under Professors Beale and Strobel respectively will together form a two-hour course. The increase in size of the School necessitates a more

extended division into sections of the classes. Property I, Property II, Torts, Contracts, Bills and Notes, and Evidence are divided into two sections; Pleading into three; and Criminal Law, as last year, into four.

THE DREYFUS CASE. — Alfred Dreyfus, a Jew, captain of the French artillery, in December, 1894, was convicted of a charge of treason by a court-martial, proceedings of which were not made public. Subsequently it has appeared that the conviction was largely based on the belief that Dreyfus was the author of the "*bordereau*," a document extracted from a waste-basket of a foreign embassy supposed to be in his handwriting. It announced the transmission of military information to the foreign government, is agreed to be authentic, and is clearly treasonable. It is understood that certain other documentary evidence — to be noted later — reinforced the belief in his guilt.

In January, 1898, the Dreyfusites brought to public trial Commandant Esterhazy — this again a military court-martial — on a charge of having written the "*bordereau*." One of the main points of the Dreyfusites was the similarity of Esterhazy's handwriting to that of the "*bordereau*." The theory of the defence was that it was written by Dreyfus, but that in attempting to avert suspicion he had imitated Esterhazy's hand — a curious inconsistency in the light of the line of proof which brought about the conviction of Dreyfus, for the "*bordereau*" was then, it seems, supposed to have been written by Dreyfus in his own hand. The court refused to allow the prosecution to give evidence or to make any reference to the Dreyfus trial to contradict that verdict, declaring it *chose jugée*. Naturally Esterhazy was acquitted. The conduct of the trial showed pretty clearly that the result was rendered under order, and the only point scored by the Dreyfusites was in showing — conclusively — that Esterhazy was a thorough-going rascal.

In 1898 Emile Zola received three trials and a final conviction in an action for libel for impeaching the justice of the Esterhazy court-martial. See 11 HARVARD LAW REVIEW, 539. These trials were important largely in that they brought to light certain portions of the evidence on which Dreyfus was originally convicted — and the thinness of it.

By this time the aspect of affairs had greatly changed. Through the efforts of one Colonel Picquart and the Dreyfusites it became clear that it was strongly probable that a certain amount of the evidence against Dreyfus had been manufactured to reinforce the original verdict, and again that this was done with the cognizance of some members of the general staff of the French army. In August, 1898, Colonel Henry, an ardent anti-Dreyfusite, and, through his official position as chief of the Secret Service Bureau succeeding Picquart, most prominent in the series of trials, committed suicide after arrest; but before his death confessed to having forged certain proof of Dreyfus's guilt, a document purporting to come from a foreign government referring to their connection with Dreyfus. The document had been used, though not shown, in the first Zola trial.

Not until after this did Dreyfus obtain a retrial. In the present year, at the petition of the Minister of Justice the Court of Cassation, the supreme court of criminal appeal in France, because of the presentation of new evidence reopened the Dreyfus case and finally decided on a new court-martial. (For a short description of the powers of the court of



Cassation see Mr. Richard Hale's "The Dreyfus Story," page 23). The work of the Court of Cassation was not a retrial, but practically an examination of the Dreyfus side of the case—its process was largely secret. It is to be noted that in neither English nor American law is there a like provision for the reopening of a criminal case after verdict because of new evidence. Texas seems the sole exception—there a court of criminal appeal may review the facts after verdict. The retrial of Dreyfus began on August 8, 1899, and continued until September 8th. The trial—save four days which were occupied with the examination of documents—was public. The evidence, as far as we know it, given at that trial sums up—to the ordinary reader—something thus: there had been a leakage in the offices of the general staff by which important military information had gone to foreign nations. It seems Dreyfus was rather a prying busybody, not a very efficient officer. There appeared no direct evidence connecting Dreyfus with any treasonable practice. Certain methods of French procedure at that trial—as in the whole series of trials—seem to the Anglo-Saxon absurdities. The witnesses told their stories, ideas and beliefs, and lugged in extraneous matter as they pleased. There was no efficient cross-examination allowed; hearsay from unreliable sources, mere gossip, was constantly reported that no English or American court—even military—would receive; the depositions of foreign attachés who presumably had knowledge of the affair were refused, perhaps on sound political reasons; a great part of the testimony was devoted to besmirching Dreyfus's personal character; the generals of the army consistently bullied the minor officers who sat as judges; and more than all these, there was, as there had been in all the trials, a constant dwarfing of the prisoner's right to a full hearing when it came, or seemed to come, in conflict with the political interests of the country and the French army. That is, for us, the amazing aspect of the case. That the rights of the individual must yield before the necessities of state is a fundamental proposition of the French law, on it the sole system of so-called "administration" law of continental countries rests. Perhaps we Anglo-Saxons cannot understand that principle or the extent to which it should be carried, but it seems impossible to get away from the conclusion that it was flagrantly misused to convict a man against whom there were insufficient proofs. Under such conditions Dreyfus was found guilty of treason with extenuating circumstances, to be immediately pardoned by President Loubet.

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A DEVELOPMENT OF THE JAMESON RAID.—To those who recall the Transvaal raid of 1895 simply as a premature expression of a political ambition which to-day is concentrating the whole power of England upon the South African Republic, it is well to point out the startling liabilities of the Hon. Cecil Rhodes, if the rest of Jameson's men follow the example set in the recent case of *Burrows v. Rhodes and Jameson*, 80 L. T. Rep. 591.

A trooper sued the instigators of the raid for damages sustained on that expedition. The fraudulent misrepresentation that they were to protect the lives of English citizens under the sanction of Her Majesty, it was claimed, had caused the plaintiff in good faith to "render himself liable to severe punishment for violating the laws of England." On demurrer it was argued for the defendant that the court should refuse its aid since the declaration disclosed the plaintiff's own criminality in violating the

Foreign Enlistment Act and since *in pari delicto melior est conditio defendantis*. Whether or not this declaration did admit the plaintiff's criminality may well be doubted. Though it stated that the plaintiff's act had rendered him liable to punishment for crime, his good faith was also alleged and by the demurrer admitted. These allegations were doubtless inconsistent, since ignorance of essential facts would prevent the existence of the criminal intent. Judge Kennedy assumed, however, the construction most favorable to the defendant: that this was one of that limited class of statutory crimes which require no general intent. To such cases he wisely denied the application of the defendant's broad proposition (though laid down by Lord Lyndhurst, C. B., in *Colburn v. Patmore*, 1 Cr. M. & R. 73) that no criminal can have an action for indemnity against one who participated in his offence.

It would seem, indeed, that wherever a plaintiff through reasonable mistake of fact has subjected himself to prosecution or suit, he may seek indemnity from one who procured his wrongful act. Thus, one who innocently converted goods in reliance on the misrepresentations of the defendant may have indemnity. *Adamson v. Jarvis*, 4 Bing. 66. On the contrary, a plaintiff, who had accepted a bill of exchange to compound a felony which the defendant was about to prosecute, could not seek indemnity for costs sustained in a suit on the void bill by a worthless indorsee of the defendant. *Fitz v. Nichols*, 2 Com. B. 501. From these cases it appears that the true interpretation of the maxim of *par delictum* emphasizes less the fact that the parties are liable for the same faults, than the fact that the faults are equal. The test of the latter is the parties' intent. They are not equally at fault when the plaintiff can say as a reasonable man that he committed the offence without evil intent at the instigation of the defendant.

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REVOCATION OF GUARANTY BY DEATH OF GUARANTOR.—The confusion in the law as to whether the death of a guarantor amounts to a revocation of his guaranty, in so far as reliance upon it after that time is concerned, rests mainly upon the fact that many courts fail to distinguish between the several groups into which such contracts naturally fall. In a bare agreement to guarantee, made in the expectation of a future sale to a third person, it is difficult to find any consideration until such sale actually takes place. A sale made after the death of the guarantor, therefore, cannot amount to a completion of the contract; for the doctrine of mutual assent demands that both parties be living at the time the contract is made. It is different, however, when the consideration passes upon the making of the agreement to guarantee. Here the bargain is complete; hence the liability of the guarantor is not terminated by his death but passes to his executors or administrators. *Kernochan v. Murray*, 111 N. Y. 306. The result is the same in a guaranty under seal, though it rests on a different principle; it is the seal and not the passing of any consideration that makes it a contract. It would seem to make no difference, therefore, if the guarantor dies before any action is taken in regard to his guaranty.

The authorities are not entirely in accord with the views here expressed. In *Jordan v. Dobbins*, 122 Mass. 168, it was held that a guaranty even though under seal is revoked by the death of the guarantor. This case is quoted at some length and with approbation in a recent decision of the Kentucky Court of Appeals. *Aitken v. Lang's Admr.*, 51 S. W. Rep.



154 (Ky.). Yet in the latter case there is nothing to show that the guaranty was under seal. Though the ultimate judgment is correct, therefore, the court seems to have taken no notice of the fundamental difference between a simple contract and a covenant. Yet in carrying out to its fullest extent the doctrine advocated above, one is met by a two-fold difficulty. To say that the guarantor's death does not revoke the guaranty under seal is to impose upon the guarantor's estate a heavy burden that may last for an indefinite length of time, though the estate of the guarantor may look to equity for relief. See *National Eagle Bank v. Hunt*, 16 R. I. 148. On the other hand, when the guaranty is not under seal, the holder is often induced to act in reliance upon it after the death of the guarantor and before he has had notice of that fact. As in the law of agency the death of the principal revokes the agent's authority without notice, so here there is at common law no escape from this difficulty.

EX POST FACTO LAWS. — It is well settled that a retroactive law which increased the punishment of a crime is, as to offences committed before that time, an *ex post facto* law, and hence under our Federal Constitution a nullity. Whether, however, a mere change in the nature of the punishment inflicted is to be deemed within the constitutional limitation is a question on which the courts do not agree. According to some authorities any law is *ex post facto* which makes an act punishable "in a manner in which it was not punishable when committed," or "which increases the punishment with which an act was punishable when committed." *Shepherd v. The People*, 25 N. Y. 406. On the other hand it has been held that the substitution for one form of punishment of another that is undoubtedly less severe is not an *ex post facto* law. This doctrine would seem to be more in accordance with the apparent object of the constitutional provision, did it not leave the whole question as to the relative severity of punishments to judicial discretion. This discretion, moreover, seems to be of a highly variable nature as between the different States. In Indiana a maximum punishment of imprisonment for seven years was deemed to be less severe than the infliction of not more than one hundred stripes. *Strong v. State*, 1 Blackf. 193. Owing to the great degradation of the punishment stripes have been held to be worse than the death penalty. *Herber v. State*, 7 Tex. 69. Yet in South Carolina a change from death to fine, imprisonment, and whipping was allowed by the Court of Appeals. *State v. Williams*, 2 Rich. 418.

In the light of these conflicting views as to the relative severity of various punishments, and as to which the criminal would prefer to suffer, — for in reality that is the ultimate test, — it would seem that the better rule is that which excludes any change in the manner of punishment, — excepting only a change from death to life imprisonment. Many authorities support this exception, and recently it has received the sanction of the Supreme Court of Mississippi, where, "to obviate the scruples of those conscientiously opposed to the infliction of the death penalty," a statute gives the jury discretionary powers to fix the punishment for murder at life imprisonment or death. This change was held not to be *ex post facto*. *McGuire v. State*, 25 So. Rep. 495 (Miss.). This exception only may well be allowed to the rule of strict construction. To go farther, however, is to leave to the discretion of the court questions which the precedents seem to show are difficult of decision and often unsatisfactory in result.

RIGHT OF LEVY ON UNRIPE CROPS.—At common law crops which require expenditure of labor, *fructus industriales*, are personalty, and as such are subject to levy and sale on sheriff's writ. *Kimball v. Sattley*, 55 Vt. 285. And, apart from statute, this general rule would seem to apply also in the case of unripened crops. In the recent case of *Tipton v. Martzell*, 57 Pac. Rep. 806 (Wash.), the Supreme Court of Washington takes a different view. There a lessee of land contracted with his lessor to harvest a crop of wheat and deliver one third of it to his landlord. In pursuance of a judgment against the tenant a sheriff levied on the growing crop three months before its maturity. The court held that the levy could not be made, for owing to the condition of the property its severance from the soil would result in no gain to the creditor and considerable loss to the debtor. Furthermore, the serving of the writ would abrogate the contract and extinguish the landlord's interest in the crop.

These difficulties, however, are more apparent than real. The levy and sale do not require immediate severance of the crop from the soil with a consequent loss to the debtor and small gain to the creditor. The vendee under sheriff's sale would have a reasonable time in which to remove the goods,—and in the present case a "reasonable time" would fairly extend to the maturity of the crop. This seems the true result on principle,—to hold otherwise is to defeat the very object for which the levy is allowed. *Peacock v. Purvis*, 2 Brod. & Bing. 362. The second difficulty which influenced the court was the existence of the agreement between the landlord and the tenant. But by this contract the landlord had no estate in the grain until the crop had ripened and was divided. Until then the wheat, being still personal property of the tenant, was subject to seizure. It is indeed possible that the court so construed the contract as to make the parties tenants in common of the crop. Such is an ordinary form of contract in similar cases. But in this event the sheriff might seize the whole, sell the interest of the debtor, and the vendee by the sale would simply become a tenant in common with the landlord. It was also suggested that the agreement here was for services to be performed only by the lessee. But the landlord's personal wishes alone should not operate to defeat the creditor's right. On principle and on authority, then, it seems clear that the levy should have been allowed.

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LANDLORD AND TENANT—HOLDING OVER.—Tenancies from year to year owe their origin to judicial legislation growing out of the hardships of estates at will where no notice was necessary to terminate the lease. Accordingly where a tenant enters under a lease void because of the Statute of Frauds, or under an unfulfilled agreement to lease, and yearly rent has been agreed on, admitted, or actually paid, he is held a tenant from year to year in jurisdictions where such tenancies are allowed. *Doe v. Tilt v. Stratton*, 4 Bing. 446; *Right v. Flower v. Darby*, 1 T. R. 159. It is also well settled in New York that if a lessee holds over after the expiration of his term his landlord may elect to treat him as a trespasser or as a tenant from year to year. And this rule has been rigidly applied. In *Haynes v. Aldrich*, 31 N. E. Rep. 94 (N. Y.), the defendant remained in possession three days after the expiration of his lease. Sickness and inability to engage trucks were his excuses,—yet the court forced on him a new tenancy.



In view of this, one is surprised to find the recent decision in *Herter v. Mellen*, 53 N. E. Rep. 700 (N. Y.), favoring the tenant. The defendants were lessees of the plaintiff for one year, rent payable monthly, and gave due notice that they would leave at the expiration of the term. They were compelled, however, to hold over for two weeks owing to the serious illness of their mother, whose life would have been endangered had she been taken from the house. The Court of Appeals held—three judges dissenting—that the failure to surrender possession promptly did not result in a tenancy from year to year under the terms of the prior lease. Purely as a matter of precedent it would seem that the minority had the best of it. However, had the court decided against the defendant it should have held him liable as tenant from month to month rather than as tenant from year to year, since the rent was payable monthly. 13 HARVARD LAW REVIEW, 142. The strict rule is so severe, so hard to justify, that it is scarcely to be regretted that the New York court has departed from precedent. To hold the procrastinating tenant as a mere trespasser is a very different question from forcing him against his will to continue as lessee. Moreover, the new tenancy is founded on a supposed agreement between the parties implied from the fact of holding over. And when the defendant states clearly that he does not wish to continue in possession it is hard to imply such a contract. The principal case, then, is clearly a step in the right direction.

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SUICIDE AFTER ASSAULT. — In the case of *People v. Lewis*, 57 Pac. Rep. 470 (Cal. Sup. Ct.), one Farrell during an altercation was shot by the defendant so that according to expert medical testimony death must have resulted within an hour. Shortly after the shooting the victim by cutting his throat made a wound sufficient in itself to cause death in much less than an hour. The defendant was convicted of manslaughter, and on appeal the court affirmed the conviction, declaring that the two wounds concurrently contributed to cause death and the defendant was accordingly responsible.

An exactly similar case has so seldom arisen that a clear statement of the law is difficult to find. Much of what is said on the topic by text-writers is based upon the remarks in 1 Hale P. C. 428. But the illustrations there given assume either that the first wound was not itself mortal or that death was hastened by unskilful medical treatment: neither instance is strictly in line with the circumstances of the present case. In *State v. Scates*, 5 Jones N. C. 420, however, it was held that where the victim of a mortal wound received subsequent fatal injuries from a second person the first wrongdoer must be acquitted.

The decision of the court in the principal case is not easy to justify. To hold the defendant guilty of murder it is necessary to establish an unbroken causal relation between his act and the death of the victim. Unless his act was partly or wholly the cause he cannot be responsible. If the deceased because of pain or fright had so far lost his self-control as not to be responsible for his act, the defendant ought to be convicted. But in this case it does not appear that such were the facts. Moreover, it is unsatisfactory to say that "but for" the first wound the second would not have been given; yet this is suggested with favorable comment. Again, it is clearly erroneous to regard the defendant's act as the last wrongful act in the series which resulted in death. To say that the two

acts "concurrently contributed" is little more than a recognition of the physical fact that the deceased at the time of his death was bleeding from both wounds. Failure to establish the causal relation, then, necessarily makes the suicide a subsequent independent act for which the doer alone is responsible. The defendant, therefore, should have been held only for the criminal assault.

**SUCCESSION TAXES AND THE CONSTITUTION.** — What will constitute a direct tax within the meaning of the third section of the United States Constitution after a century of decisions is again disputed. In the case of *High v. Coyne*, 93 Fed. Rep. 450 (Cir. Ct., Ill.), on demurrer to a bill to enjoin the imposition of the Succession Tax provided by the War Revenue Act of 1898, it was held that such a tax is not upon property in the ordinary sense, but on the privilege of succession thereto: that it is, therefore, not a direct tax.

The Constitution requires that direct taxes be apportioned to the States according to population. This impractical method has induced a somewhat technical definition of direct taxes. To economists contemporary with the Constitution direct taxation seems to have meant a tax on the capital or revenue of individuals as distinguished from a tax on their expenses. In interpreting the Constitution, however, there was a tendency till 1894 to reduce this definition to capitation and land taxes. *Hylton v. United States*, 3 Dall. 171; *Veazie Bank v. Fenno*, 8 Wall. 533. And so a succession tax like that in the principal case has been held indirect as falling outside this definition. *Scholey v. Rew*, 23 Wall. 331. In the Income Tax cases, however, there appears a more liberal tendency. The definition of direct taxes was extended there by a divided court to include personalty and incomes derived from realty or personalty. *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601. It is possible, therefore, that the Supreme Court will now overrule *Scholey v. Rew*, *supra*, and hold this Succession Tax also direct. On the other hand, the distinction of the Circuit Court between the right to succeed to property on the death of the former owner and the right of ownership has been taken so constantly in State courts under various constitutional prohibitions that it has become the generally accepted doctrine. *Minot v. Winthrop*, 162 Mass. 113.

As an original question it would seem hardly conclusive to say, with these courts, that a tax on succession is not a tax on a property right but an excise on a privilege conferred by the State, which, throughout the history of the common law, the State has regulated, — which, according to some courts, the State may abolish. Society also grants as a privilege private ownership; and whether deemed rights or privileges, both, under our constitutions, are subject to State regulation differing only in degree. That there has been much greater restriction of succession, is, however, a sensible ground for a distinction, — one which will not conflict with the income tax cases. The common-law doctrine that a rent of land is an incorporeal hereditament, and, therefore, itself in the nature of realty, may logically explain the decision that an income tax is direct. It may well be, however, that the court was largely influenced in that case by the convenience of treating the income from property as property itself, and that this tendency to avoid technical distinction in a matter of commercial importance will lead them to say in this case that the right to succeed to property is itself a property right.



## RECENT CASES.

**BANKRUPTCY — PROPERTY VESTING IN TRUSTEE.** — *Held*, that the interest of a husband in the real estate of his wife during her lifetime and after issue born does not pass to his trustee in bankruptcy. *Hesseltine v. Prince*, 95 Fed. Rep. 802 (Dist. Ct., Mass.).

By the general provisions of section 70 of the Bankruptcy Act of 1898 all interests in real estate of the bankrupt vest in the trustee. Under the corresponding section, § 14, of the Bankruptcy Act of 1867 the courts had no difficulty in holding that the estate of a tenant by the curtesy initiate passed to his trustees subject to the limitations inherent in the nature of the estate. *Re M'Kenna*, 9 Fed. Rep. 27. The same result was reached under a similar provision of the English Bankruptcy Statute. *Cooper v. McDonald*, 7 Ch. D. 288. Such, doubtless, should be the general rule. But the Federal court in the principal case is governed by Massachusetts law, which does not consider this species of estate transferable. *Lynde v. MacGregor*, 95 Mass. 182. The decision, therefore, will probably not be followed in other jurisdictions.

**BANKRUPTCY — SET-OFF OF CLAIMS.** — A and B were jointly liable on a promissory note, and B was also indebted to A. A became bankrupt and B paid the note. *Held*, that B cannot set off a moiety of the note against his indebtedness to the estate of A. *Re Bingham*, 94 Fed. Rep. 796 (Dist. Ct., Vt.).

The Bankruptcy Act of 1898, § 68, following the Bankruptcy Act of 1867, § 20, directs a set-off in all cases of mutual debts except debts arising after the bankruptcy or procured after the bankruptcy with a view to such use. The present case does not fall within these exceptions, since the claim existed before the bankruptcy and the claimant came into the position of the original obligee by subrogation. *Smith v. Brinkerhoff*, 6 N. Y. 305; *Humphreys v. Blight*, 4 Dill. 370. But, to constitute mutual debts within the meaning of the statute, it is held requisite that they should be contracted between the same persons in the same capacity and in the same right. *Re Lane*, 2 Low. 305; *Munger v. Albany, etc. Bank*, 85 N. Y. 580; *Gray v. Rollo*, 18 Wall. 629. And since in the principal case the claim of the debtor against the estate is that of another, gained by subrogation, the lack of such mutuality seems obvious. Accordingly, the refusal of the court to allow the set-off is unexceptionable.

**BILLS AND NOTES — TRANSFER AFTER MATURITY — NOTICE.** — A pledgee of a promissory note, wrongfully transferred it after maturity to an innocent party. *Held*, that the transferee is entitled to collect the note. *Young Men's, etc. Co. v. Rockford Nat. Bank*, 5 N. E. Rep. 297 (Ill.).

The court goes on the ground that the defendant could not be charged with notice of the wrongful transfer because the rule that the transferee after maturity takes subject to equities applies only to equities between maker and payee. It is generally held, however, that any defence which would be valid against the transferer of a note is equally valid against the transferee after maturity. *Miller v. Bingham*, 29 Vt. 82; *Hetch v. Dennis*, 10 Me. 244. These cases regard such a transfer as not depriving the true owner of his title; an overdue note in this respect resembling an ordinary chattel. *Texas v. Hardenburg*, 10 Wall. 68. A better view seems to be that the title to such paper passes on assignment just as it does before maturity, and that the fact that it is overdue charges the holder with notice of equities existing between the maker and payee, since he must know that the note should be home at maturity. To say, however, that the holder must at his peril find out the rights as between previous holders is burdensome and unjust. The principal case, while contrary to the great weight of authority, seems good sense and sound principle. *Connell v. Bliss*, 52 Me. 476.

**CARRIERS — RAILROADS — MONOPOLIES.** — A railroad company prohibited all public vehicles except those of one corporation from standing and soliciting business before the entrance to its depot. *Held*, that this regulation is invalid as tending to restrict competition and enhance prices. *Indianapolis Union Ry. Co. v. Dohn*, 53 N. E. Rep. 937 (Ind.).

The existence of statutory or constitutional provisions has complicated the decisions on this point, but the weight of authority is probably in accord with the principal case. *Huck. & Bus. Co. v. Sootsma*, 84 Mich. 195; *State v. Reed*, 24 So. Rep. 308. The decisions *contra* distinguish between granting the sole right to receive and deliver passengers and the sole right to solicit them, finding an interference with public right only in the former case. *Old Colony R. R. v. Tripp*, 147 Mass. 35; *New York, etc. R. R. Co. v.*

*Sheeley*, 27 N. Y. Supp. 185. The question is one purely of public policy, and on the whole the view of the principal case seems the better. Reasonable regulations fixing the time and place in which hackmen may solicit are essential for proper service and are permissible; but the law may well refuse to allow a railroad to create a practical monopoly in which there is great possibility of public injury without any corresponding probability of public advantage.

CONSTITUTIONAL LAW — EX POST FACTO LAWS. — A retroactive law substituted life imprisonment for the death penalty as the punishment for murder. *Held*, that as to offences committed before the passage of the law and punishable thereafter, it is not an *ex post facto* law. *McGuire v. State*, 25 So. Rep. 495 (Miss.). See NOTES.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATION — REGULATION OF WEIGHT OF BREAD. — *Held*, that a city ordinance fixing the minimum weight of a loaf of bread is invalid. *Buffalo v. Collins Baking Co.*, 57 N. Y. Supp. 347 (Sup. Ct., App. Div., Fourth Dept.).

The ground taken in this somewhat novel decision is that the ordinance interferes unreasonably with the right of each individual to regulate his own business. Granting that the municipality had any power to regulate the weight of a loaf, it cannot be said that the provisions of the ordinance in question were an unreasonable exercise of that power. And the right of a municipality to regulate the weight and quality of bread has had repeated judicial recognition. *Munn v. Illinois*, 94 U. S. 113, 125; *People v. Wagner*, 86 Mich. 594; *Paige v. Fuzackerly*, 36 Barb. 392; *Mobile v. Yuille*, 3 Ala. 137. It is difficult to support the case, which is chiefly interesting as illustrating a not unusual tendency to give undue weight to an ordinary conception of the term "liberty."

CONSTITUTIONAL LAW — SUCCESSION TAX. — *Held*, that the succession tax in the War Revenue Act of 1898 is constitutional. *High v. Coyne*, 93 Fed. Rep. 450 (Cir. Ct., Ill.). See NOTES.

CONTRACTS — FRAUD — NEGLIGENCE. — A lessee who was unable to read signed a lease after it had been read to him by the lessor, who fraudulently suppressed certain conditions contained therein. *Held*, that the lessee is bound by such conditions as against the lessor. *Binford v. Brusco*, 54 N. E. Rep. 146 (Ind.).

The court cited *Lindley v. Hofman*, 53 N. E. Rep. 471, for the proposition that the order to relieve the signer of an instrument from liability thereon, not only must the instrument have been obtained by fraud, but also the party executing it must have been free from negligence. In that case, however, the rule was invoked against the maker of a promissory note, which was in the hands of a purchaser for value without notice. There is no doubt that an innocent purchaser of negotiable paper, obtained by fraud, may collect it from a negligent maker, *Leach v. Nicols*, 55 Ill. 273; but such a case furnishes no argument for the proposition that an instrument obtained by fraud should be enforced between the parties because the signer was negligent. A man may act on a positive representation of fact, notwithstanding the fact that means of knowledge were open to him. *Coltrill v. Krum*, 100 Mo. 397. And when one relies on another's statement, that other should not be allowed to say he was negligent. *Smith v. Land, etc. Corporation*, 28 Ch. D. 7. It is difficult to see how the case can be supported. See *Alexander v. Brogley*, 43 Atl. Rep. 888, *contra*.

CONTRACTS — GUARANTY — DEATH OF GUARANTOR. — On a written guaranty not under seal the seller sought to charge the guarantor's estate for goods sold after the guarantor's death, but before he had notice of that fact. *Held*, that the death of the guarantor was a revocation of the guaranty as regards all sales made after that time. *Aitken v. Lang's Admr.*, 51 S. W. Rep. 154 (Ky.). See NOTES.

CONTRACTS — ILLEGAL CONTRACTS — EIGHT HOUR LAW. — A statute provided that the working day in smelters and mines should be eight hours; and that any "person, body corporate, agent, manager, or employer" violating the provisions of the act should be deemed guilty of a misdemeanor. *Held*, that the statute applies alike to employer and employee, and an employee working in a smelter more than eight hours per day cannot recover for his services during the overtime. *Short v. Bullion, etc. Mining Co.*, 57 Pac. Rep. 720 (Utah).

This appears to be the only decision on a point of considerable interest. A dissenting opinion takes the ground that the statute was designed to protect the laborer against oppression by his employer, and should not be turned against him whom it was intended to benefit. The United States Supreme Court expressed *obiter*, a similar opinion in passing upon the constitutionality of the law. *Holden v. Hardy*, 169 U. S. 366, 397. This construction is perhaps more consistent with the somewhat ambiguous wording of the enactment. On the other hand, the view of the majority, that the law, dealing as it does with occupations peculiarly injurious to the health, was passed as



a protection not only to the laborer, but to the community at large, embodies a broader and more satisfactory conception of the policy of the enactment, and justifies the conclusion that the employee cannot waive its provisions. *Birkett v. Chatterton*, 13 R. I. 299.

**CONTRACTS — JUDICIAL SALE — DESTRUCTION OF PROPERTY BEFORE DEED.** — A purchaser at a judicial sale paid part of the purchase money, but before the deed was delivered the premises were partly destroyed by fire. *Held*, that the purchaser has gained no legal or equitable title, and is, therefore, not bound to take the premises. *Harrigan v. Golden*, 58 N. Y. Supp. 726 (Sup. Ct., App. Div., Second Dept.).

It has been held in New York that in a judicial sale the mortgagee cannot enforce specific performance against the purchaser, because the referee is the seller, and he alone can invoke the aid of equity. *Mitchell v. Bartlett*, 51 N. Y. 447. As the right to equitable actions is mutual, it follows from this reasoning that the purchaser could specifically enforce the sale against the referee. The position of the principal case that the purchaser gains no equitable title by the sale is clearly inconsistent with this deduction from the earlier case. Moreover, if the ordinary purchaser of land is to be given equitable rights against the seller before the delivery of the deed, it is difficult to see why the vendee at a judicial sale should not have similar rights, and decisions in other States are in line with this opinion. *Duff v. Randall*, 116 Cal. 226; *Stewart v. Freeman*, 22 Pa. St. 120.

**CONTRACTS — SUIT BY BENEFICIARY.** — M contracted with C to leave her property by will to the plaintiff, her niece, but wrongfully devised it to the defendant. *Held*, that the plaintiff as beneficiary is entitled to enforce performance of the contract by the defendant. *Everdell v. Hill*, 58 N. Y. Supp. 447 (Sup. Ct., Special Term).

The New York courts have previously held that an intended beneficiary, not a party to the contract, can maintain an action for its performance only when such person is related lineally or married to the promisee, or has a legal claim against the promisee and thus a legal interest in the execution of the agreement. *Buchanan v. Tilden*, 158 N. Y. 109; *Durnherr v. Rau*, 135 N. Y. 219. The principal case carries still further the doctrine of consideration by relationship, which at the outset seems opposed to sound principle. See 12 HARV. LAW REV. 560. Justice might be accomplished equally well on the equitable theory of constructive trusts. The defendant has received through the wrongful act of another property, for which he gave no value. He therefore should hold the same as a constructive trustee for the victim of the wrong. See 13 HARV. LAW REV. 227.

**CRIMINAL LAW — HOMICIDE — SELF DEFENCE.** — *Held*, that to justify the taking of life in self defence, the accused must show that he had reasonable grounds for believing himself in great peril of life or serious bodily harm. *People v. Kennedy*, 54 N. E. Rep. 51 (N. Y.).

The doctrine of this decision is supported by the great weight of authority. *Maher v. People*, 24 Ill. 241; *Shorter v. People*, 2 N. Y. 193; *Nabois v. State*, 25 So. Rep. 529. It has been held, indeed, that if the accused can show that he acted from an honest belief in the greatness and imminence of his peril he will be excused. *Grainger v. State*, 5 Verg. 459. But the dangers of such a broad rule are self-evident; the slightest appearances might justify the most extreme measures. The question being one of public policy, the probable results to the community at large govern, and therefore a reasonable as well as an honest belief on the part of the defendant should be demanded.

**CRIMINAL LAW — SUICIDE AFTER ASSAULT.** — X, after being mortally wounded by a shot from the defendant's gun, cut his own throat. *Held*, that the defendant is guilty of homicide. *People v. Lewis*, 57 Pac. Rep. 470 (Cal., Sup. Ct.). See NOTES.

**DAMAGES — BREACH OF CONTRACT.** — In an action against the defendant for the breach of his promise to make the plaintiff an heir, *held*, that the measure of damages is the value of the services rendered and the outlay incurred by the promisee on the faith of the promise. *Sandham v. Grounds*, 94 Fed. Rep. 83 (C. C. A., Third Cir.).

It is a fundamental rule that the measure of damages for a breach of contract is the value of the promise, and not the consideration nor the outlay. *Roper v. Johnson*, L. R. 8 C. P. 167. And such also is the rule in cases of anticipatory breach like the present. *Brown v. Muller*, L. R. 7 Ex. 319. Accordingly, upon principle the measure of damages in the principal case should be the present value to the promisee of the estate of the promisor at his death. But such a value would usually be so uncertain as to be incapable of proof, and consequently the promisee would fail wholly. See 13 HARV. LAW REV. 149. As it avoids this unfortunate result the rule adopted in the present case which allows the promisee to recover his outlay is to be commended although it is contrary to the theory of damages. In accord are *Hutchinson v. Snider*, 137 Pa. St. 1; *Bernstein v. Meech*, 130 N. Y. 354; *United States v. Behan*, 110 U. S. 338.

**EVIDENCE — HEARSAY — DECLARATIONS OF INTENTION.** — In a suit to probate a will, the issue was undue influence. *Held*, that declarations of the testator, made before, at the time of, or after making the alleged will are admissible to establish his intention. *Re Burn's Estate*, 52 S. W. Rep. 98 (Tex. Civ. App.).

An exception to the rule of evidence excluding hearsay admits declarations of declarant's existing state of mind, that is to say, contemporaneous statements of intention. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285. Much confusion has arisen from a failure to distinguish between such cases and those where a declaration is introduced as tending to show a weak mental condition. Such declarations of a testator, made within a reasonable time after the execution of the will, may give rise to a legitimate inference on the issue of his sanity at the time of the execution. *Waterman v. Whitney*, 11 N. Y. 593. But the case is quite different where a testator's declaration of his own intention is offered. Such declarations may be made under such circumstances as to be of direct probative value on the issue of intention at another time, but the court in the principal case seems not to have gone into that question. The rule laid down admitting generally declarations made after the will, is apparently the result of a failure to make the distinction noted above.

**EVIDENCE — RAPE — CHARACTER OF PROSECUTRIX.** — In a prosecution for rape, *held*, that evidence is admissible to prove that the prosecutrix had previously had intercourse with other men. *People v. Shea*, 57 Pac. Rep. 885 (Cal. Sup. Ct.).

The court declined to overrule the early case of *Benson v. State*, 6 Cal. 221, holding that specific acts of unchastity with men other than the defendant might be proved to negative the probability of resistance on the part of the prosecutrix. This rule has been adopted in a few cases. *State v. Reed*, 39 Vt. 417; *Titus v. State*, 7 Baxt. 132. But the general and better view is that, while the chastity of the prosecutrix may be questioned, it can be attacked only by evidence of general reputation. 3 Greenl. Ev., 14th ed., 203; *Commonwealth v. Harris*, 131 Mass. 336; *State v. Fitesimon*, 18 R. I. 236. It is an objection to the rule of the principal case that it allows a multiplicity of issues and is likely to work a surprise on the prosecution; nor is proof of specific acts so much more persuasive on the question of chastity than evidence of general reputation as to counterbalance its manifest disadvantages.

**EVIDENCE — SUBSEQUENT REPAIRS — RELEVANCY.** — *Held*, that evidence of repairs having been made to machinery after an accident is admissible to show negligence in not having made such repairs at an earlier period. *Champion Ice Mfg., etc. Co. v. Carter*, 51 S. W. Rep. 16 (Ky.).

The rule laid down in the present case finds favor in several jurisdictions. *McKee v. Bidwell*, 74 Pa. St. 218; *St. Louis, etc. R. R. Co. v. Weaver*, 35 Kan. 315. Subsequent repairs, however, do not necessarily show prior negligence or defect, as they may be acts of extreme caution and not absolutely requisite for protection. It would be better, therefore, to exclude such evidence as irrelevant and as having but little probative value. *Atchison, etc. R. R. Co. v. Parker*, 12 U. S. App. 132. Its admission, moreover, will have the undesirable tendency to discourage employers in making alterations and repairs which would render machinery more safe and accidents less frequent. The great weight of authority is *contra* to the present case. *Columbia, etc. R. R. Co. v. Hawthorne*, 144 U. S. 202; *Corcoran v. Village of Peekskill*, 108 N. Y. 151.

**PERSONS — DIVORCE — TEMPORARY ALIMONY.** — In an action for divorce, brought by the wife, the husband denied the marriage. *Held*, that in order to be entitled to temporary alimony the wife must prove the marriage by a preponderance of the evidence. *Hite v. Hite*, 57 Pac. Rep. 227 (Cal. Sup. Ct.).

The view taken by the principal case was adopted in *McKenna v. McKenna*, 70 Ill. App. 340. On the other hand it has been held that, in order to get temporary alimony, it is enough for the wife to make out a fair probability that she will maintain her allegations. *Brinkley v. Brinkley*, 50 N. Y. 184; *Collins v. Collins*, 80 N. Y. 1. Although such a proceeding is summary, the only safe rule is to require that essential facts be proved by a preponderance of the evidence that is presented at the hearing. Considerations of public policy in divorce cases should have no great weight, since either rule may work hardship in extreme cases. Hence, while the authority on this point is about evenly divided, the rule of the principal case seems the preferable one.

**PROCEDURE — PHYSICAL EXAMINATION.** — In an action for personal injuries, *held*, that the court has the power to compel the plaintiff, on pain of dismissal, to submit to a physical examination by medical experts. *Lane v. Spokane Falls, etc. Ry. Co.*, 57 Pac. Rep. 367 (Wash.).

The above decision is supported by the weight of authority. *Schroeder v. Chicago, etc. Ry. Co.*, 47 Iowa, 375; *Graves v. City of Battle Creek*, 95 Mich. 266. Some courts deny the existence of such a power on the ground that it infringes upon the right of



personal immunity. *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 200; *McQuigan v. Delaware, etc. R. R. Co.*, 129 N. Y. 50. The latter view seems extreme and not conducive to justice. A physical examination is the best kind of evidence of the character and extent of an injury, and would produce no serious personal inconvenience or danger if conducted in a proper manner and by competent persons. The doctrine of the principal case thus tends to a better ascertainment of the truth and a prevention of fraudulent actions, and on these grounds may be justly commended. 1 Greenl. Ev., 16th ed., § 469 m.

**PROPERTY — LEASE — HOLDING OVER.** — The defendants, lessees of the plaintiff for one year, gave notice that they would surrender the premises at the expiration of the term. Owing to a serious illness in the family they were obliged to hold over for two weeks. *Held*, that the landlord cannot continue the lease for another year. *Herter v. Mullen*, 53 N. E. Rep. 700 (N. Y.). See NOTES.

**PROPERTY — LOSS OF LIEN.** — The plaintiff in an action of trover declared on a factor's lien, but later amended and averred title. *Held*, that the right to insist on the lien is not thereby destroyed. *Rosenbaum v. Hayes*, 79 N. W. Rep. 987 (N. D.).

Both the English and American authorities are contrary to the view expressed, holding that the mere assertion of ownership destroys the lien. *Boardman v. Sill*, 1 Camp. 410, note; *Hanna v. Phelps*, 7 Ind. 21; *White v. Gainer*, 3 Bing. 23. While these cases take the ground that the lien is lost by merger, they fail to explain how one right can merge in the mere assertion of another. The court in the principal case discards this view and rests the decision of such cases on the ground of estoppel. The result thus reached commends itself as a just solution of the question. If the defendant has relied on the assertion of title and has been thereby damaged, the plaintiff will be prevented from setting up his lien. Otherwise the plaintiff's error will not prejudice his rights.

**PROPERTY — STATUTE OF LIMITATIONS — ADVERSE USE.** — The defendant occupied real property for the statutory period under a mistaken belief that it was part of the public domain, and with the expectation of acquiring title from the government. *Held*, that this does not constitute adverse possession under a statute vesting the adverse possessor for the required time with a perfect title. *Beale v. Hite*, 57 Pac. Rep. (Oreg.).

If a man innocently occupies another's land under the belief that it is his own, so that there is in fact a claim of title against the world, his possession is generally considered adverse. See 13 HARV. LAW REV. 152. The principal case raises the question whether a claim antagonistic to the owner's title merely is sufficient, and on this point there is a direct conflict. In accord with the view therein expressed is *Schleicher v. Gattlin*, 85 Tex. 270. *Contra* are *Fellows v. Evans*, 53 Pac. Rep. 491; *McManus v. O'Sullivan*, 48 Cal. 7. The latter decisions seem right. The exact wording of the statute, on which the principal case lays such stress, is unimportant, since statutes of limitation are now generally considered as vesting the title, no matter what their wording. Their object is to quiet title, and the underlying theory is that the owner is barred after a certain time by his negligence. As such negligence arises wherever there is an unopposed occupancy under a claim hostile to the owner's title, the existence of such a claim alone should be sufficient to bar recovery.

**PROPERTY — TREES — SEVERANCE.** — *Held*, that standing trees sold in contemplation of immediate severance from the soil are personal property. *Tilford v. Dolson*, 51 S. W. Rep. 583 (Ky.).

The weight of authority in this country is opposed to the view here taken. *Hirth v. Graham*, 50 Ohio St. 57; *Green v. Armstrong*, 1 Denio, 550. In England and in a number of the States, however, the doctrine of the principal case has prevailed. *Marshall v. Green*, 1 C. P. D. 35; *Claffin v. Carpenter*, 45 Mass. 580. This doctrine rests upon the theory of constructive severance, the expressed intention of the parties to the sale being regarded as bringing about a change in the nature of the subject-matter. Such a view is objectionable as adding to the number of legal fictions; and, moreover, it is confusing and unnecessary. There appear to be no cases where the attempt has been made to apply it to similar easily removed products of the earth, such as coal and stone. It is simpler and more logical to regard all such substances as retaining the inherent quality of realty until severed.

**SALES — STATUTE OF FRAUDS** — *Held*, that a contract for the sale of articles to be manufactured is within a statute requiring a writing in the case of a sale of goods or chattels of a certain price or over. *Mechanical Boiler Cleaner Co. v. Kellner*, 43 Atl. Rep. 599 (N. J., Sup. Ct.).

The court in this case has adopted the Massachusetts view that a contract to sell articles to be manufactured in the regular course of business is a sale of goods within

the Statute of Frauds, and not a contract for labor and materials. *Mixer v. Howarth*, 38 Mass. 205; *Goddard v. Binney*, 115 Mass. 450. The New York courts, on the other hand, hold that a contract of sale is not within the statute unless the articles are in existence at the time the agreement is made. *Parsons v. Loncks*, 48 N. Y. 17; *Cooke v. Millard*, 65 N. Y. 352; *Higgins v. Murray*, 73 N. Y. 252. Since the degree of completion required under the phrase "in existence" has never been defined by the New York courts, the uncertainty of the rule tends to cause confusion and renders it unsatisfactory in practice. It would seem, then, that as between the two doctrines the one existing in Massachusetts is preferable.

**TORTS — CONTRACTS — DUTY TO THIRD PARTIES.** — The defendant company contracted to furnish the city with a supply of water adequate for protection in case of fire. The plaintiff's house was burned because of the defendant's failure to perform the contract. *Held*, that the plaintiff can recover. *Gorrell v. Greensboro Water Supply Co.*, 32 S. E. Rep. 720 (N. C.).

While the declaration in the principal case sounded in tort the court seems to have allowed a recovery on the ground of contract. In either aspect it is difficult to support the decision. The cases almost universally hold that one who by contract assumes an obligation to use care toward another is not thereby placed under any duty toward third parties. *Winterbottom v. Wright*, 10 M. & W. 109. Nor does the principal case fall within an exception which holds that such a duty is imposed when the subject-matter of the contract is dangerous to life. *Thomas v. Winchester*, 6 N. Y. 397. If, on the other hand, the case be considered from the standpoint of contract, the great weight of authority is against allowing a recovery where the beneficiary is not expressly named, but belongs merely to a class which is benefited by the performance of the agreement. *Boston, etc. Trust Co. v. Salem Water Co.*, 94 Fed. Rep. 238; *Bush v. Artesian, etc. Water Co.*, 43 Pac. Rep. 69.

**TORTS — CONTRIBUTORY NEGLIGENCE — LOOK AND LISTEN RULE.** — *Held*, that the failure of a plaintiff to stop, look, and listen before crossing a railroad track, is not contributory negligence as a matter of law. *Judson v. Central Vermont R. R. Co.*, 53 N. E. Rep. 514 (N. Y.); *Illinois Central R. R. Co. v. Jones*, 95 Fed. Rep. 370 (C. C. A., Sixth Cir.).

These cases establishing the law in the United States Circuit Courts and the New York Court of Appeals in regard to the look and listen rule, are in accord with the great weight of authority and lay down the better doctrine. *Terre Haute, etc. R. R. Co. v. Voelker*, 129 Ill. 540; *Cincinnati, etc. R. R. Co. v. Furra*, 31 U. S. App. 307. Contributory negligence is a question depending on the circumstances of each particular case, and for the court to say that the plaintiff is negligent as a matter of law in every case if he does not stop, look, and listen before crossing a railroad track, seems an unwarrantable encroachment on the province of the jury. Yet such a rule is firmly established in some jurisdictions, particularly Pennsylvania. *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St. 504; *Reading & Columbia R. R. Co. v. Ritchie*, 102 Pa. St. 425.

**TORTS — DAMAGES — MENTAL SUFFERING.** — While the plaintiff and his wife were passengers on the defendant's road, drunken men were allowed to enter the car, and use obscene language. *Held*, that the plaintiff may recover for injury to his wife's feelings. *Houston, etc. Ry. Co. v. Perkins*, 52 S. W. Rep. 124 (Tex. Civ. App.).

By the weight of authority mental suffering is not regarded as an element of damages except when it is the result of physical injury. *Victorian Ry. Commrs. v. Coultas*, 13 App. Cas. 222; *Spade v. Lynn, etc. R. R.*, 168 Mass. 285. However, an increasing number of cases allow damages where such mental suffering results in perceptible physical injury. *Bell v. Great Northern Ry. Co.*, 26 L. R. Ir. 428; *Purcell v. St. Paul City Ry.*, 48 Minn. 134. The latter seems the sounder view. In fact, whatever injury results from a tortious act, should, in theory, be compensated for in damages. But as a matter of public policy, it is best to restrict this rule to cases where the fact of injury to the nervous system can be clearly shown through its effect upon the body. Without this restriction a flood of groundless and fraudulent claims would inevitably result. The principal case, while logically unassailable, overlooks the pernicious results sure to ensue from its practical application. Its doctrine has been followed, however, in a number of jurisdictions. *Widsworth v. Western Union Tel. Co.*, 86 Tenn. 695; *Reese v. Western Union Tel. Co.*, 123 Ind. 294.

**TORTS — DECEIT — PLEADING.** — The plaintiff brought an action of deceit against the defendants for inducing a violation of the Foreign Enlistment Act. The latter demurred on the ground that the declaration disclosed a joint violation of said act by the plaintiff. *Held*, that the demurrer is overruled. *Burrows v. Rhodes & Jameson*, 80 L. T. Rep. 591. See NOTES



**TRUSTS — FRAUD — CONSTRUCTIVE TRUST.** — A was about to make a gratuitous transfer of land to X. B, by fraud, induced A to convey the property to an innocent purchaser in consideration of certain notes and a mortgage on the property given to B. *Held*, that X is not entitled in equity to have the notes and mortgage assigned to her by B. *Stipes v. Decker*, 78 N. W. Rep. 769 (Wis.).

If B had by fraud induced A to convey the land in question to her, she would have been compelled to hold it as constructive trustee for X. *Segrave v. Kirwin*, Beat. 157; *Bulkley v. Wilford*, 2 Cl. & Fin. 177. Had she in breach of that trust conveyed the res to a purchaser for value without notice she would have held the proceeds of the transaction upon a like trust. *Trevelyn v. White*, 1 Beav. 589; *Cheney v. Gleason*, 117 Mass. 557. The fact that the conveyance was made directly to an innocent vendee does not change the principle involved or affect the rights and duties of the parties concerned. B, through her fraud, has got into her control the product of property which would otherwise have gone to X, and such product in good conscience belongs to X. Therefore, the court should, in accordance with established rules of equity and in analogy to decided cases, have declared B a trustee of these securities for the grantor's intended beneficiary.

**TRUSTS — PAROL AGREEMENT — CONSTRUCTIVE TRUST.** — The plaintiff purchased and had conveyed to the defendant, his wife, a tract of land which the wife orally agreed to hold in trust for him. *Held*, that the plaintiff is not entitled to have the land conveyed to him. *Murray v. Murray*, 53 N. E. Rep. 946 (Ind.).

It is well settled in Indiana that a resulting trust does not arise where the husband pays the purchase price for land and the title is vested in the wife, although there is no statute forbidding it. *Lochenour v. Lochenour*, 61 Ind. 595; *Montgomery v. Craig*, 128 Ind. 48. The court might, however, have given the land to the plaintiff upon another theory. It is held in England that a grantee of land upon an oral trust to reconvey, who refuses to fulfil his obligation, must hold as constructive trustee for the grantor. *Davies v. Otty*, 35 Beav. 208; *Haigh v. Kaye*, L. R. 7 Ch. 469. The plaintiff in the principal case was in substantially the same position as the grantor in the English cases, and was entitled to a like relief if they are sound. It is believed that they are. The courts do not enforce an express trust in violation of the Statute of Frauds. They create a new trust upon the ground that the grantee shall not take advantage of the statute to work a fraud, but must either perform his undertaking or surrender the land to him who is in equity best entitled to it. This doctrine has been generally repudiated in this country, but there has been some tendency recently to adopt it in cases like the present. *Gage v. Gage*, 31 N. Y. Supp. 903.

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## REVIEWS.

**THE NECESSITY FOR CRIMINAL APPEAL** as illustrated by the Maybrick Case. Edited by J. H. Levy. London. 1899. pp. vii, 609.

The chief value of this book is the verbatim report of Mrs. Maybrick's trial, now for the first time published in convenient form. Both in itself and in the legal circumstances that surround it, this is one of the most remarkable trials of the century, and it well repays careful study.

The five hundred pages of trial, in the intention of the editor, are merely illustrative of the need of some court for the revision of convictions of crime. In further emphasis of this need, he has appended statements of the law of many countries bearing on the question of revision. This part of the book is perhaps neither so useful nor so convincing as the editor hoped. Revision of a criminal conviction may mean either of two things, — revision of the facts, or a new trial because of error of law. In foreign systems of law these two things are not clearly distinguished, as the statements in this book show; in our system of law the distinction is fundamental and necessary. The desire for a Court of Criminal Appeal which shall revise findings of fact is a desire with which most lawyers will not greatly sympathize. Why should one accused of crime, who has

had the advantage on his trial of the extremely liberal provisions of our law, and has been convicted by a jury, claim the advantage of a second chance before a bench of judges? Trial by jury is reprobated by some more or less perfectly informed persons, but never, probably, on the ground that it is too apt to convict the innocent. If the jury is not to be abandoned, it would seem a sufficiently liberal tribunal for the determination of fact. For revision because of errors of law, on the other hand, a court ought surely to be provided; and the chief defect of the English judiciary to-day is that for error of law in the course of the trial a convicted person cannot secure a new trial. The absence of a Court of Criminal Appeal on points of law is a glaring defect of English justice.

Both these points are emphasized by the case of Florence Maybrick. That the woman was morally guilty of the murder of her husband is probable on the evidence; whether a verdict of guilty could legally be justified on the evidence is doubtful; but that she had a fair and legal trial no lawyer, on reading the report of the trial, could possibly affirm. In an American court a hundred valid exceptions would have been taken to the judge's charge, and no lawyer would have consented to argue them for the prosecution. The conviction is in fact a sombre monument of the decay of a great intellect. If a Court of Criminal Appeal for revision of errors of law had existed at the time of the trial, Mrs. Maybrick would have obtained a new trial; she could not ask for more than that. If revision on the facts had been legally attainable, she would have had a slender chance of acquittal.

J. H. B. JR.

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A TREATISE ON THE LAW OF EVIDENCE. By Simon Greenleaf. Sixteenth Edition, revised, enlarged, and annotated by John Henry Wigmore. Boston: Little, Brown & Co. 1899. pp. cxxxiv, 993.

Few text-books have had so great an influence in moulding a branch of the law as Greenleaf's Evidence. Since its first appearance in 1842 it has been constantly followed by the courts, and it may be said that very much of it — errors and all — has been assimilated into American law. But certain factors have worked great changes in the law of evidence since the time of its publication: broad statutory changes have cut out whole blocks of the law, there has been a surprising extension of certain principles in new and unexpected directions, and again careful study of the subject has altered — nay, subverted — old ideas of its principles. And in the mean time the classic of the subject has passed through constant editions with surprisingly little change save the piling up of citations. With the full consciousness of these conditions Mr. Wigmore has prepared the sixteenth edition of Greenleaf — and it is more than a re-editing of the book, it is a remoulding of it. The substantial part of Greenleaf — so much as has become of the tissue of the law — the editor has left in its old form. This he has surrounded with new sections which amplify, explain, and correct it. Where the original text is entirely inadequate or obsolete, it is relegated to appendices, and entire new chapters are inserted. In his exposition of the principles of the law of evidence the editor has largely followed the work of Professor Thayer. In the general plan, as well as in detail, — and he is the first to claim it, — he has made constant use of Professor Thayer's results. The amount of work in Mr. Wigmore's edition is monumental, more, it seems, than if he had written an entirely new treatise. Not only is the law of evidence carefully examined and minutely worked



out, but, harder still, all this new matter he has fitted into the original Greenleaf, and the work is well done. The completeness of the lists of authorities brought down to date, care in composition, a thorough grasp of principles, and orderly workmanship at once mark the work apart from the modern machine-made text-book. Sometimes perhaps the author shows a certain rashness in his statements, a willingness to see the progress of the law in the progressive tendencies of certain jurisdictions; but on the whole it is eminently sound. There is one practical objection to the book—perhaps unavoidable, when we remember the plan of the edition—it is not an easy book to use. Mr. Wigmore's mechanical devices for distinguishing the various strata of Greenleaf, and his editors are hardly adequate, the sublettering of sections that almost exhausts the alphabet is inconvenient, and the original Greenleaf is sometimes almost muffled by the explanations. Again, those portions of the text which Mr. Wigmore has himself supplied are occasionally not clear because of an overminuteness of detail. But these are the almost necessary faults of an exhaustive text-book; in spite of them, Mr. Wigmore's work is admirable.

J. P. C. JR.

THE LAW OF PRESUMPTIVE EVIDENCE. By John D. Lawson. Second Edition. St. Louis: Central Law Journal Company. 1899. pp. xcii, 710.

Presumptions and rules of presumption are commonly enough classified as belonging peculiarly to the law of evidence,—an error doubtless due to ill-considered phraseology of the judges. A presumption—that which is taken for granted—is merely a name for a method of abbreviating judicial inquiries—a short cut in argument based on probability or on policy. It belongs primarily to the subject of “legal reasoning;” and in many cases it hardens into a fixed rule of substantive law,—as where twenty years' adverse possession requires the inference of a lost grant. The facts on which the presumption is based are evidence, but the rule of inference does nothing more than fix the “legal equivalence of facts.” Thayer, *Preliminary Treatise on Evidence*, 317. In view of this the title of the second edition of Mr. Lawson's book, “The Law of Presumptive Evidence,” would seem ill-phrased. A presumption may accomplish the result of evidence,—it cannot be styled so much probative matter.

But although the title be questionable Mr. Lawson's work is a distinct success. The first edition aimed to set forth the law of presumptions under one hundred and thirty-nine rules, illustrated from decided cases with discussions showing the reasoning of the courts in applying a particular rule. In this second edition the author has brought the book up to date with an exhaustive list of authorities. He has introduced also a novel feature in indicating on a side page which of the particular rules have been approved by courts of last resort. The subject is dealt with in six parts: The Presumption of Knowledge; The Presumptions of Regularity and Innocence; The Presumptions of Continuance and Uniformity; The Presumptions in the Law of Real Property; The Presumptions in Criminal Cases; General Rules. Unencumbered by lengthy commentary of the reasons for or against any particular rule, the book is an admirable working manual of ready reference. No attempt has been made to point out the relation of presumptions to other branches of the law or to choose between conflicting theories—notably on p. 255. Mr.

Lawson has wisely avoided extended comment as unnecessary for the working practitioner, choosing rather to devote the space to extracts from opinions and a systematic list of authorities. He has produced a book which is sure to be of inestimable service, if not to the beginner, to the bar and bench.

J. W.

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We have also received :

IMPERIAL RULE IN INDIA ; being an Examination of the Principles proper to the Government of Dependencies. By Theodore Morison. Westminster: Archibald Constable & Co. 1899. pp. 147. This book is a brief examination of the Indian government and the progress which it has made toward the time when India may be self-governing. Speaking generally, the author's conclusion is that that time is indefinitely postponed because of the lack of national feeling among the nations. He suggests, as a means of unifying the discordant elements, the cultivation of a greater feeling of emotional loyalty to the personal sovereign, the Empress of India. His analysis of the present condition of Indian affairs, of a distrustful and almost disaffected population, is more convincing to the ignorant reader than his system of remedies. The book is careful, clear, and interesting, and the general point of view remarkably sane and free from prejudice. The main interest that the book has to Americans at the present moment is, of course, in the comparison which it inevitably presents between India and our own dependencies. The disaffection and coolness that mark an Indian conquered people are not likely to be absent from the Philipinos. The suggested remedy of fostering loyalty to a personal sovereign is laughably inappropriate.

A DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW. By Arthur English. Washington, D. C.: Washington Law Book Co. 1899. pp. 979. This volume differs distinctly from the general run of law dictionaries in that it is confined strictly to definition and is not a law encyclopaedia. The reader looking to find an account of any law subject at length will be disappointed. The definitions are short and concise, but they are apparently careful, and the collection of words and phrases both ancient and modern is exceedingly extensive and well chosen. Such a book must necessarily from its very conciseness be incomplete and unsatisfactory in many respects, but it has a legitimate place, and should prove a useful addition to the reference library of either lawyer or student. A list of abbreviated titles of reports and text-books in the appendix gives it an added practical value which the practising lawyer will not fail to appreciate. An error noticed in this list was the citation of the *New England Reporter* alone for the abbreviation *N. E. Rep.* and the omission of the *North Eastern Reporter* for which this abbreviation usually stands.

STATE TRIALS. Edited by Charles E. Lloyd. Chicago: Callaghan & Company. 1899. pp. vi, 260. The standard edition of the State Trials is that of T. B. Howell, in twenty-one volumes, London: 1816. That great collection has always been held in the highest esteem by lawyers and by students of English history. The aim of the editor of the present series is "to place these valuable and interesting old English classics in



the hands of the masses." To this end he has selected three of the State trials: those of Mary Queen of Scots, of Sir Walter Raleigh, and of Captain William Kidd — a most varied but a striking list. Moreover, he has condensed the standard text when it seemed to him to involve discussions and repetitions useless to the general reader. And furthermore, he subjoins, perhaps too infrequently, annotations for the benefit of the lay reader.

**THE DREYFUS STORY.** By Richard W. Hale. Boston: Small, Maynard, & Co. 1899. pp. 68. This little book is an admirable account of the Dreyfus matter up to the time it came before the Court of Cassation which ordered the revision. The bearing of the Esterhazy and Zola trials is explained, the legal aspects of the case are pointed out, and the evidence is carefully boiled down. The book is simple and clear — a find for those who know the case only through the newspaper reports. It is understood that a second edition will deal with the later phases of the case.

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# HARVARD LAW REVIEW.

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VOL. XIII.

DECEMBER, 1899.

No. 4.

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## THE CONSTITUTIONAL POWER OF THE COURTS OVER ADMISSION TO THE BAR.

ON November 4, 1897, the Supreme Court of Illinois promulgated a new set of rules. Rule 39 provided for the appointment by the court of a State Board of Law Examiners, who were to conduct examinations in a prescribed list of subjects for admission to the bar, and certify to the court the names of successful candidates. This rule also raised the required period of study before examination to three instead of two years, and omitted the provision previously existing in the court rules, by virtue of which graduates of law schools organized under the laws of the State, upon presenting their diplomas were admitted without examination.

No exception was made in these respects in favor of students who had begun their studies before the adoption of the new rule.

As soon as the rule was published, organized efforts were made by law students and others to procure its alteration. An elaborate memorial was presented to the court on behalf of the law students who were affected by the change of rules. Later a joint resolution of the Legislature was obtained on January 25, 1898, which declared it to be "the sense of this Assembly," that the rule should be modified so as not to apply to such students. But the

court, intimating that the rule was framed in the interest of the people of Illinois, not of the law students, remained obdurate on the points of three years' required study and no admission without examination.

The same organization therefore procured the passage of an act, approved February 21, 1899, only one vote being cast against it in the Legislature, the material sections of which were as follows: —

"SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That no person shall be permitted to practise as an attorney or counsellor at law, or to commence, conduct, or defend any action, suit or plaint, in which he is not a party concerned, in any court of record within this State, either by using or subscribing his own name or the name of any other person, without having previously obtained a license for that purpose from some two of the justices of the Supreme Court, which license shall constitute the person receiving the same an attorney and counsellor at law, and shall authorize him to appear in all the courts within this State, and there to practise as an attorney and counsellor at law, according to the laws and customs thereof, for and during his good behavior in said practice, and to demand and receive fees for any services which he may render as an attorney and counsellor at law in this State. No person shall be refused a license under this act on account of sex,<sup>1</sup> and every applicant for a license who shall comply with the rules of the Supreme Court in regard to admission to the bar in force at the time such applicant commenced the study of law, either in a law office or a law school or college, shall be granted a license under this act, notwithstanding any subsequent changes in said rules.

*Provided*, That to date of the 31st day of December, A. D. 1899, a diploma regularly issued by any law school, regularly organized under the laws of this State, whose regular course of law studies is two years, and requiring an actual attendance by the student of at least thirty-six weeks in each of such years, and showing that the student began the study of law prior to November 4, A. D. 1897, shall be received by the Supreme Court of this State, and a license of admittance to the bar shall thereupon be granted by the said court to the holder of such diploma; but every application for admission to the bar made on behalf of any person to whom any diploma, as aforesaid, has been awarded, must be made in term time by motion of some attorney of the said court, supported by the usual proofs of good moral character, and the production

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<sup>1</sup> To this point the statute follows the law previously in force, 1 Starr and Curt. Ann. Ill. Stat., 2d ed., 489, ch. 13, § 1.



in the said court of such diploma, or satisfactorily accounting by the applicant for its non-production; and in all cases when the diploma on which the application is based does not recite all the facts requisite to its reception, all such omitted facts must be shown by the affidavit of the applicant or some officer of the law school, or by both.<sup>1</sup>

*"Provided further,* That any student who has studied in a law office in this State for two years, or who for the period of two years has studied law part of such two years in a law office and part in the aforesaid law school, and whose course of studies began prior to November 4, 1897, shall be admitted to practice law, upon a satisfactory examination in the branches now required by the rules of the Supreme Court of this State, except that he shall not be required to present to the examining board any proof as to his preliminary general education by examination or otherwise."

In accordance with this act, a motion was made in the Supreme Court by Henry M. Day, and a large number of other persons, at its April Term, 1899, for admission to the bar upon presentation of their diplomas from law schools, organized under the laws of the State. The application was resisted, on behalf of the Chicago Bar Association, and after hearing argument for and against the motion, the court, Justices Phillips and Boggs dissenting, rendered its decision June 19, 1899, refusing the application on constitutional grounds.<sup>2</sup>

Chief Justice Cartwright delivered the opinion of the court. The part of the act which provides that "every applicant for a license who shall comply with the rules of the Supreme Court in regard to admission to the bar in force at the time such applicant commenced the study of law, either in a law office or a law school or college, shall be granted a license under this act notwithstanding any subsequent changes in said rules," was held to be prospective in its operation, under the rule that "a statute will be construed to have a prospective effect, if such a conclusion is permissible;" the court saying: "In this case no intention to make the enactment retrospective is expressed, but such an intention is clearly negatived by the attempt to legislate for those affected by the change already made under the form of a

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<sup>1</sup> This paragraph is drafted from what was Rule 47 of the Supreme Court of Illinois before November 4, 1897, changing "may be received" to "shall be received," and making the rule mandatory instead of permissive.

<sup>2</sup> The case is reported in 4 Chicago L. J. N. S. 288; 31 Chicago Legal News, 377. An application for a rehearing has been refused.

proviso. And, further, if the enactment were retrospective, students to be examined would go to the Appellate Court [under the former rules of the court], while the proviso sends them to the Examining Board. To hold it retrospective would make the proviso repugnant to it. The provision quoted, therefore, operates only as a rule for the future, and does not confer the rights claimed on this application."

The proviso expressly providing for admission on diploma was held unconstitutional upon two grounds. Upon the first, the language of the court is quoted entire, as it presents a neat illustration of what is popularly called "class legislation." The provision of the Constitution of Illinois cited by the court provides against the General Assembly's passing "local or special laws" granting to individuals "any special or exclusive privilege, immunity, or franchise whatever." No opinion was expressed upon the point suggested by counsel, that on account of its arbitrary classification this legislation was a denial of the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States. Under the provisions of the act two persons of precisely the same qualifications as to studies pursued might present the same diploma at the same time; and one would be entitled to admission without examination, while the other would not.

"Concerning the proviso, however, as an enactment, it is clearly special legislation, prohibited by the Constitution, and invalid as such. If the Legislature had any right to admit attorneys to practise in the courts and take part in the administration of justice, and could prescribe the character of evidence which should be received by the court as conclusive of the requisite learning and ability of persons to practise law, it could only be done by a general law, and not by granting special and exclusive privileges to certain persons or classes of persons. (Constitution, art. 4, sec. 22). The right to practise law is a privilege, and a license for that purpose makes the holder an officer of the court, and confers upon him the right to appear for litigants, to argue causes and to collect fees therefor, and creates certain exemptions, such as from jury service and arrest on civil process while attending court. The law conferring such privileges must be general in its operation. No doubt the Legislature, in framing an enactment for that purpose, may classify persons so long as the law establishing classes is general, and has some reasonable relation to the end sought. There must be some difference which furnishes a reasonable basis for different legislation as to the different classes, and not a purely arbitrary one having no just relation to the subject of the legislation. (*Braceville Coal Co. v. The People*, 147 Ill.



66; *Ritchie v. The People*, 155 id. 98; *Gulf, Colorado, & Santa Fé E. R. Co. v. Ellis*, 165 U. S. 150.) The length of time a physician has practised and the skill required by experience may furnish a basis of classification (*Williams v. People*, 121 Ill. 84), but the place where such physician has resided and practised his profession cannot furnish such basis, and is an arbitrary discrimination, making an enactment based upon it void. (*State v. Pennoyer*, 65 N. H. 113.) Here, the Legislature undertakes to say what shall serve as a test of fitness for the profession of the law, and plainly any classification must have some reference to learning, character or ability to engage in such practice. The proviso is limited, first, to the class of persons who began the study of law prior to November 4, 1897. This class is subdivided into two classes: first, those presenting diplomas issued by any law school of this State before December 31, 1899; and, second, those who studied law for the period of two years in a law office, or part of the time in a law school and part in a law office, who are to be admitted upon examination in the subjects specified in the present rules of this Court, and to this latter subdivision there seems to be no limit of time for making application for admission. As to both classes, the conditions of the rules are dispensed with, and as between the two, different conditions and limits of time are fixed. No course of study is prescribed for the law school, but a diploma granted upon the completion of any sort of course its managers may prescribe is made all sufficient. Can there be anything with relation to the qualifications or fitness of persons to practise law resting upon the mere date of November 5, 1897, which will furnish a basis of classification? Plainly not. Those who began the study of law November 4 could qualify themselves to practise in two years, as well as those who began on the 3d. The classes named in the proviso need spend only two years in study, while those who commence the next day must spend three years, although they would complete two years before the time limit. The one who commenced on the 3d, if possessed of a diploma, is to be admitted without examination before December 31, 1899, and without any prescribed course of study; while as to the other, the prescribed course must be pursued, and the diploma is utterly useless. Such classification cannot rest upon any natural reason or bear any just relation to the object sought, and none is suggested. The proviso is for the sole purpose of bestowing privileges upon certain defined persons.

"It is not a mere change of system at a given date, but it recognizes the change made, and the power of the court to make future changes subject to a certain restriction, and legislates for a particular class. Students who began before and after November 3, 1897, were pursuing their studies when it was passed, and those who began after that date and before December 31, 1897, would complete two years before December 31, 1899, but cannot enjoy its privileges."

The second and main ground upon which the proviso for admission was held unconstitutional was that it disregarded the constitutional division of the powers of government into legislative, executive, and judicial. The principle involved is therefore one applicable wherever this constitutional subdivision is made. The Constitution of Illinois (article 3) contains an express prohibition as follows: "The powers of the government of this State are divided into three distinct Departments, — legislative, executive and judicial; and no person, or collection of persons, being one of these Departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." The court are careful to point out that the determination whether admission to practise law belongs to the judicial department of the government is not answered simply by showing the history of the subject in England, where the Legislature is not prevented by any constitutional restriction from exercising powers properly judicial; they say, "Whatever the English practice may have been, the question must be what the nature of the power is, and whether it is one which naturally pertains to the courts. If it is judicial in its nature the Legislature is expressly prohibited from exercising it. The history of the admission of attorneys in England, however, does not justify the claim that it is the exercise of the legislative function, but utterly refutes it." They point out that at common law there was no right to appear by attorney except by virtue of a special warrant from the King,<sup>1</sup> until by various acts of Parliament the privilege was made general.<sup>2</sup> A summary is given of the history of admission of attorneys as follows:—

"In 1292, Edward I. made an order by which he appointed the Lord Chief Justice of the Court of Common Pleas and the rest of his fellow Justices of that Court; that they, according to their discretion, should provide and ordain from every county certain attorneys and apprentices of the best and most apt for their learning and skill who might do service to his court and people, and those so chosen and no other should follow his court and transact the affairs thereof; the said King and his Counsel then deeming the number of seven score to be sufficient for that employment; but it was left to the discretion of the said Justices to add to that

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<sup>1</sup> Maugham on Attorneys, p. 5; 1 Pollock & Maitland, *History of English Laws*, 1st ed., p. 190.

<sup>2</sup> The first general statute was that of Westminster II., c. 10, in the 20th year of Edward I. 1 Pollock & Maitland, 192, note.



number or diminish as they should see fit. (1 Pollock & Maitland, History of English Law, 194; Dugdale's Orig. Jurid. 141.) The profession of an attorney was placed under control of the judges, and the discretion to examine applicants as to their learning and qualification and to admit to practise was exercised from that day by the judicial department of the English government, and no legislation sought to deprive the court of the power in that respect, or to invest it in any other branch of the government. Parliament legislated upon the subject, but the legislation was of a character to exclude persons unfit to practice, who threatened the public welfare through ignorance or untrustworthiness. The statutes always recognized that the admission of attorneys was a matter essentially belonging to the courts and a matter of judicial discretion, and only sought to protect the public against improper persons. The first of these acts was the 4 Henry IV., c. 18, passed in 1403. The attorneys had increased to the number of two thousand, and the act reciting that damages and mischiefs ensued from the great number of attorneys unlearned in the law, ordained and established that all attorneys should be examined by the justices, and by their discretion their names put in the roll, and the other attorneys put out by the discretion of said justices, and their masters for whom they were attorneys should be warned to take others in their places, so that in the meantime no damage nor prejudice should come to their said masters. (Maugham, Attorneys, Ap. 9.) In 1413, by the 1 Henry V., undersheriffs, sheriffs, clerks, receivers, and bailiffs were excluded from practising as attorneys, because 'the king's liege people dare not pursue or complain of the extortions and of the oppressions to them done by the officers of sheriffs.' In 1455, by the 33 Henry VI., c. 7, Parliament limited the number of attorneys for Suffolk, Norfolk, and Norwich, reciting that the number has increased more than eighty, 'Most of whom, being not of sufficient knowledge came to fairs, etc., inciting the people to suits for small trespasses.' In 1606, by the 3 James I., c. 7, it was attempted to further regulate attorneys to the same end. (Maugham, Attorneys, Ap. 13.) Parliament did not, by any of these acts, undertake to determine the amount of learning which would qualify a person for admission. The courts from time to time made their rules regulating the admission of attorneys, and on occasion provided for the appointment of a committee or board of examiners. (Maugham, Attorneys, Ap. 14, 16.) Blackstone says (3 Com. 26), "These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster Hall. . . . No man can practise as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court; an attorney of the Court of King's Bench cannot practise in the Court of Common Pleas, nor *vice versa*. . . . So as early as the statute 4 Henry IV., c. 18, it was enacted that attorneys should be examined by the judges, and none

admitted but such as were virtuous, learned, and sworn to do their duty."

The court show that the admission of barristers by the Inns of Court forms no exception to the rule, that the control of admission was always in the judges, pointing out, that in case of a person whom the Inns refused to call to the bar, there was a remedy by appeal to the judges as visitors of all the Inns of Court, citing *Boorman's Case*, March, 177; *King v. Gray's Inn*, 1 Doug. 353; *King v. Benchers of Lincoln's Inn*, 4 B. & C. 855. In the United States courts, the control of admission of attorneys, it is stated, has been recognized from the beginning, and the doctrine consistently maintained, that the act of admission is judicial. Since attorneys are officers and members of the courts, the Legislature cannot deprive the courts of discretion as to whom they shall admit.

The only authority cited sustaining an act compelling the courts to admit on diploma<sup>1</sup> is disposed of as follows: —

"In that case, the Legislature enacted a statute admitting to practice on diploma of the Columbia College, and it was held that the act was valid. Counsel for applicants in this case contend that the subject is legislative and not judicial in its character and the act of admission is ministerial. Their chief reliance is that case of *Cooper*. The first question there considered by the Court of Appeals was whether the admission of attorney was a judicial proceeding. The Supreme Court had denied admission, and *Cooper* had appealed. It was suggested that the power of admitting attorneys was executive or administrative rather than judicial, and this objection, if well founded, would be fatal to the appeal. Upon a full consideration of that question, it was held that the admission of attorneys was a judicial proceeding and the exercise of an appropriate judicial function. The appeal was entertained on that ground. The power being judicial in its nature, our Constitution prohibits its exercise by the Legislature. The court based its decision upon the ground that although the appointment of attorneys had usually been intrusted in that State to the courts, and was judicial in its nature, yet it was not a necessary or inherent part of their judicial power, but was subject to legislative action, and had been derived from statute. In that State, the power to admit to practice was exercised before the Revolution by the Governor. By the Constitution of 1777 the appointment of attorneys was given to the courts, but the provision was dropped from the Constitution of 1846, which provided, 'Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts

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<sup>1</sup> *Matter of Cooper*, 22 N. Y. 67.



of this State'. In view of the history of admission and this particular condition of affairs, the act was sustained. The consequences have been greatly deplored by eminent men abundantly able to judge of the injustice to the public resulting from the rule then established, under which other special laws were passed.

The court then point out that in their own practice they had never recognized the right of the Legislature by statute to force attorneys on the court, without examination, but from early times had acted upon their own rules on the subject.

The main argument of the applicants, that the statute was passed by the Legislature in the exercise of the "police power," was answered by the court as follows:—

"It may be readily admitted that such all-pervading power does, in some respects, reach the practice of the law, and gives to the Legislature some power concerning it. The Legislature may enact police legislation for the protection of the public against things hurtful or threatening to their safety and welfare. They may prescribe reasonable conditions, which will exclude from the practice those persons through whom injurious consequences are likely to result to the inhabitants of the State. The proviso in this case bears upon its face no such object, but practically concedes the wisdom of a change in the rules, and that such change is in the public interest, and attempts to give particular persons the privilege of admission, based upon some fancied right accruing on account of the time when they commenced the study of the law. Parliament and the Legislature have always required that persons to be admitted should have certain qualifications and fulfil certain requirements. They have properly excluded persons whom they deemed unfit, but with the single exception above named in New York have not forced the admission of any one. It would be strange, indeed, if the court can control its own court-room and even its own janitor, but that it is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers. . . .

"The function of determining whether one who seeks to become an officer of the courts and to conduct causes therein, is sufficiently acquainted with the rules established by the Legislature and the courts, governing the rights of parties and under which justice is administered, pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact, and to bring the facts and law before the court, so that a correct conclusion may be reached. The order of admission is the judgment of the court that he possesses the requisite qualifications under such restrictions and limitations as may be properly imposed by the

Legislature for the protection and welfare of the public. The fact that the Legislature may prescribe the qualifications of doctors, plumbers, horse-shoers, and persons following other professions or callings not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question.<sup>1</sup> A license to such persons confers no right to put the judicial power in motion, or to participate in judicial proceedings. The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have lawsuits. He is the first one to sit in judgment on every case, and whether the court shall be called upon to act depends on his decision. It is our duty to maintain the provision of the Constitution, that no person or collection of persons, being one of the departments of the government, shall exercise a power properly belonging to another, and if the Legislature by inadvertence, as in this case, assumes the exercise of a power belonging to the Judicial Department, it should only be necessary to call their attention to the restraint imposed by the Constitution.

"Whatever may have been the propriety of the rule admitting the holder of a diploma issued by a law school to practice, in view of the law schools existing at its adoption, the rule had become an alarming menace to the administration of justice. The Legislature of New York, by the statute above referred to, only sought to admit the graduates of a great university who had been examined by eminent lawyers, but under our rule persons were admitted who had been only nominally in attendance for the stipulated period of time upon schools of a very different grade. There was no State supervision of law schools, and any person who saw fit could organize a law school, and, by advertising that the diplomas admitted to the bar, could obtain students. The language of the proviso, 'any law school regularly organized under the laws of this State,' is mere sound and means nothing. Anything in the form of a law school is regular so far as the laws of this State are concerned. In view of the disastrous consequences to the profession and the public, the rule by which it was only a step from the diploma mill to the bar was changed, and, in an effort to discharge a duty to the public, the general standard of admission was raised. That the change was a wise one, and that it will tend to promote the public welfare, is not denied by counsel for applicants, who desire to elevate the standard of the bar, and assure us that they sympathize with us in our efforts in that direction. It is conceded that when the rule was made, November 4, 1897, the court had full power to make it, and to fix the standard of admission. It was a valid rule of the court acting within its unquestioned jurisdiction, and the

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<sup>1</sup> A board of medical examiners, in licensing practitioners, acts in an administrative, not a judicial, capacity. *France v. State*, 57 Oh. St. 1 (1897); 47 N. E. Rep. 1041, 1042.



question is whether the Legislature could rightfully encroach upon a power belonging to the Judicial Department and set aside the rule. The Constitution answers the question in the negative.

"The motion to admit the applicants by virtue of their diplomas is denied."

Justices Phillips and Boggs, dissenting, rely upon *dicta* in various Illinois cases, as showing that the court had hitherto considered itself as deriving its power of admission and disbarment of attorneys from statute. They approve the doctrine of Cooper's case, and conclude, "The control exercised by the Legislature being the exercise of a police power with reference to the subject-matter, cannot be held to be an impairment of judicial power, nor the assumption of such judicial power by the Legislature."

The very interesting account given by Pollock and Maitland of the origin of the legal profession<sup>1</sup> concludes as follows: "In Edward I.'s day it is that our legal profession first begins to take a definite shape. We see a group of counsel, or serjeants and apprentices on the one hand, and a group of professional attorneys on the other, and both of them derive their right to practise from the King, either mediately or immediately."

It is interesting to notice that the ordinance of Edward I. of 1292, which although possibly not the first of its kind, is the oldest regulation we have been able to discover of the admission of attorneys as a professional class, comes to us from the date of the first Year Book.<sup>2</sup> The text, the substance of which is fully quoted by the court in its opinion, will be found in the Parliament Roll of 20 Edward I., No. 22,<sup>3</sup> also in Dugdale's *Origines Juridicales*, c. 55,<sup>4</sup> and in Pulling's *Order of the Coif*.<sup>5</sup> According to Pulling this ordinance probably precedes the institution of the Inns of Court,<sup>6</sup> and the separation of the profession into attorneys and barristers.<sup>7</sup> It is noteworthy that the ordinance of Edward I. observes no distinction between these two classes. It treats attorneys and "apprentices *ad legem*" alike. Their admission is subject to the action of the judges in any case. It ought also to be remembered that the power over admission of both attorneys and

<sup>1</sup> Vol. 1, pp. 190-196, 1st ed. For a number of citations and valued suggestions upon the history of admission to the bar, I am indebted to Professor E. A. Harri-man.

<sup>2</sup> 1 Poll. & Mait., 1st ed., 195.

<sup>3</sup> P. 84.

<sup>4</sup> 2d ed., 141.

<sup>5</sup> Am. ed., 111.

<sup>6</sup> Ib. 112.

<sup>7</sup> Ib. ch. iv.

barristers conferred on the judges, thus antedates the admission of barristers by the Inns of Court.

Lord Mansfield tells us later that this power of the Inns of Court was derived from the judges, and subject to their revision.<sup>1</sup> Chief Justice Doe has collected a large part of the learning on the subject of admission to the bar in *Ricker's Case*,<sup>2</sup> and concludes that the power of admission and disbarment of attorneys was inherent in the courts at common law.

The statutes passed by Parliament from time to time for the regulation of admission to the bar, some of which are cited by the court, are collected in the appendix to "*Maugham on Attorneys*." They have invariably been of a negative character, forbidding the admission of unfit or unworthy persons.

The English courts from time to time, by virtue of their own rules, without any legislation, regulated the admission and disbarment of attorneys. The various rules adopted from 1573 to 1704 are collected by Maugham.<sup>3</sup> Thus, for example, in Hilary Term, 1616, the court ordered that the number of attorneys be reduced, by the removal of the superfluous number, "wherein respect to be had that the most unfit and unskilful persons be removed."<sup>4</sup> In Michaelmas Term, 1654, a rule of the King's Bench and Common Pleas Courts provided for the appointment of a board of examiners.<sup>5</sup> In Trinity Term, 1793, a rule of court undertook to regulate admission to the bar.<sup>6</sup> The power of the courts to determine the matter of admission to the bar, which had been thus exercised for centuries, was clearly recognized by the statute 2 George II., chapter 23. By this act, which was passed in 1729, and which was in force with slight modifications at the time of the American Revolution, the judges were required to examine as to the fitness and capacity of persons seeking to become attorneys or solicitors, and if they were satisfied with the qualifications of candidates, then, and not otherwise, to admit them.<sup>7</sup>

The first Congress of the United States provided that parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law as by the rules of

<sup>1</sup> *King v. Benchers of Gray's Inn*, 1 Doug. 353, 354 (1780). See also *King v. Benchers of Lincoln's Inn*, 4 B. & C. 855, 858 (1825).

<sup>2</sup> 66 N. H. 207, 213; s. c. 29 Atl. Rep. 559, 562 (1890).

<sup>3</sup> *Maugham on Attorneys*, 15-20, App. xiv-xx.

<sup>4</sup> *Ib.* App. xiv.

<sup>5</sup> *Ib.* 19, App. xvi.

<sup>6</sup> *Ib.* 55.

<sup>7</sup> *Ib.* 57, App. i.



the several courts shall be permitted to manage and conduct cases.<sup>1</sup>

The laws of Northwest Territory, July to December, 1792,<sup>2</sup> provided that from and after the first day of January, 1793, no person should be admitted or practise as an attorney in any of the courts of the territory unless he was a person of good moral character and well affected to the government of the United States and of this territory, and should pass an examination of his professional abilities, before one or more of the territorial judges.

The Indiana Territorial Act of September 17, 1807,<sup>3</sup> in force in Illinois by the Illinois Territorial Act of December 3, 1812,<sup>4</sup> required a license from "two of the judges of the General Court," and the verbiage of the act is mainly preserved in the Illinois act of February 10, 1818,<sup>5</sup> from which the first sentence in section 1 of the act of February 21, 1899, is taken.

It is reasonable to conclude, from an examination of the historical records, that for more than six hundred years it has been the practice of the courts to admit attorneys upon their own examination, and that at the time the Colonies separated from the mother country the power of examination and admission of attorneys was vested in the courts.

The fundamental question after all is, however, the nature of the attorney's office, and the relation in which he stands to the court. Perhaps the most interesting cases on this point are those in the Federal courts.

The state and congressional statutes of the reconstruction period immediately following the Civil War, which imposed test oaths upon attorneys as a prerequisite of practising in the courts, that the applicant, for example, had never voluntarily borne arms against the United States, compelled a very serious examination of the relation of the attorney to the court. Such statutes were sustained in the earlier cases of *Cohen v. Wright*<sup>6</sup> and *Ex parte Yale*,<sup>7</sup> but were ultimately and decisively overthrown by the Federal courts.

<sup>1</sup> Act of Sept. 24, 1789, 1 St. at L. 92, 1st Session, c. 20, s. 35; 2 Wilson's Works (Andrews ed.), 247.

<sup>2</sup> (Phila., 1794), p. 40, chap. 10, sec. 1.

<sup>3</sup> 1 Laws of Illinois Territory, 58; Laws of Indiana Territory, 1807 (Vincennes), 162.

<sup>4</sup> Laws of Illinois Territory, 1st Session, p. 5 (Russellville, Ky., 1813).

<sup>5</sup> Laws of Illinois (Kaskaskia, 1819), p. 9.

<sup>6</sup> 22 Cal. 293, 319 (1863).

<sup>7</sup> 24 Cal. 241 (1864); 85 Am. Dec. 62.

One of the most interesting of the early cases was *In re Shorter*,<sup>1</sup> where an application was made for leave to practise in the Federal courts without taking the test oath prescribed by the act of Congress of January 24, 1865. In that case Busteed, District Judge, makes the following comment on the thirty-fifth section of the Judiciary Act of September 24, 1789,<sup>2</sup> to which we have just referred: —

"This act, it will be remembered, was passed shortly after the adoption of the national Constitution, and when the principles upon which it was founded were familiar to the minds of every statesman and politician. It was intended by the legislature to carry into effect that provision of the organic law which provides that 'the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time establish.' The thirty-fifth section of this act is a clear concession to the courts of exclusive jurisdiction over the subject of the admission of attorneys and counsellors to practise, and may, I think, be taken as an acknowledgment by Congress that this is a matter within the 'judicial power of the United States.' It is certain that the courts have uniformly acted upon this understanding, and until the passage of the law of January 24, 1865, — nearly eighty years, — Congress has not attempted to exercise any control over the subject."<sup>3</sup>

The court then quotes Chief Justice Taney, in *Ex parte Secombe*,<sup>4</sup> that, "It has been well settled by the rules and practice of common-law courts that it rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counsellor, and for what cause he ought to be removed," and makes the following comment: "If Congress may, *ex mero motu*, exact that a man who has aided in the Rebellion shall thereafter be absolutely disqualified from practising law in the national courts, notwithstanding that he has been previously admitted under their rules, why may not Congress exact that a man shall be allowed to practise in those courts without any other qualification than having fought under the banners of the Republic? If the former may be decreed as a penalty, why not the latter as a reward? Where shall the power of the courts over the conduct and qualifications of attorneys end, and where the power of Congress begin? How shall the conflict of jurisdiction that might arise be settled? It must not be forgotten that Con-

<sup>1</sup> Fed. Cas. No. 12, 811 (1865).

<sup>2</sup> 22 Fed. Cas. pp. 18-19.

<sup>3</sup> 1 Stat. L. 92.

<sup>4</sup> 19 How. 9.



gress does not originate either the national courts themselves or the office, privilege, or franchise of an attorney and counsellor in those courts. If it did, I am not prepared to say that it could not annex such conditions to the enjoyment of the privilege as it might consider wise and just." On this and other grounds the court held the requirements of the test oath unconstitutional.

In the celebrated case of *Ex parte* Garland,<sup>1</sup> the Supreme Court of the United States held the same act of Congress unconstitutional upon other grounds. We quote from the opinion of the court<sup>2</sup> a passage relied upon by the Supreme Court of Illinois, as follows: —

"They [attorneys] are officers of the court admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has always been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such offices in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. (*Ex parte* Heyfron, 7 How. (Miss.) 127; *Fletcher v. Daingerfield*, 20 Cal. 430.) Their admission or their exclusion is not the exercise of a more ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the Court of Appeals of New York in the matter of the application of Cooper for admission. (Matter of Cooper, 22 N. Y. 81.) Attorneys and counsellors, said that court, are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their oppointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

Illustrations of the attorney's peculiar relationship to the court are to be found in the power of the court to compel him to serve

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<sup>1</sup> 4 Wall. 333.

<sup>2</sup> P. 378.

poor persons gratuitously, and his privilege from arrest on civil process while attending courts. His admission is an act of *quasi* public character to which any person may object.<sup>1</sup> The discretion of the court in refusing admission cannot be controlled by mandamus.<sup>2</sup> In the case of *Ex parte Secombe*,<sup>3</sup> the Supreme Court refused to grant a mandamus to the judges of the Supreme Court of Minnesota Territory, to compel them to reinstate Secombe as an attorney of that court. Chief Justice Taney, speaking for the court, said, "We are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to annul its decision, where the decision was in its nature a judicial act within the scope of its jurisdiction and discretion." If, as the decisions generally agree, in admitting an attorney the court acts judicially, this would seem to be an end of the controversy, for manifestly the Legislature cannot, without usurping judicial power, bind the court in advance to decide the case a certain way.

An interesting case upon the general question is *Petition of Splane*.<sup>4</sup> In this case Splane relied upon the act of May 7, 1885, providing that any attorney or counsellor at law who should "have been duly admitted to practise in any Court of Common Pleas and in the Supreme Court of this Commonwealth shall be admitted to practise in any other court of this Commonwealth upon motion simply, by exhibiting to the court (1) a certificate of admission to the Supreme Court, and (2) filing a certificate of the presiding judge of the county or district from which he came, setting forth that he is of reputable professional standing and unobjectionable character."<sup>5</sup>

The court was of the opinion that the petitioner had not presented a certificate from the presiding judge of the proper county or district, and that the act contemplated the county or district in which the attorney had last practised. The act provided in terms, that the court *shall* admit attorneys in the cases there recited; but the court do not base their opinion upon non-compliance with the terms of the act alone. After pointing out that in the admission of an attorney the court acts not ministerially, but judicially, they say: —

<sup>1</sup> *Ex parte Walls*, 73 Ind. 95, 106 (1880); *In re Burchard*, 27 Hun, 429, 437 (1882).

<sup>2</sup> *Commonwealth v. Judges*, 1 S. & R. (Pa.) 187 (1814).

<sup>3</sup> 19 How. 9, 13, 15 (1856).

<sup>4</sup> 123 Pa. St. 527, 540 (1889); S. C. 16 Atl. Rep. 481; 23 Wkly. Notes Cas. 154.

<sup>5</sup> 123 Pa. St. 532.



"If there is anything in the Constitution that is clear beyond controversy, it is that the Legislature does not possess judicial powers. They are lodged exclusively in the judiciary as a co-ordinate department of the government. The executive and legislative departments can no more encroach upon the judicial department than the latter can encroach upon them. Each department, in our beautiful system of government, has its own appropriate sphere, and, so long as it confines itself to its own orbit, the machinery of government moves without friction. . . . We are clearly of opinion that the act of 1887, though probably not so intended, is an encroachment upon the judiciary department of the government."<sup>1</sup>

The constitutional question is suggested, but not decided, in Goodell's case,<sup>2</sup> where a woman applied for admission to the bar, and a very strong intimation is given that the court would not submit to a statute requiring them to admit persons whom they considered improper. In the same volume of reports they refused to obey a statute requiring them to admit non-residents as attorneys.<sup>3</sup>

The judicial nature of the act of admission is brought out still more clearly by its converse, the act of disbarment, which is a part of the same power. It is manifest that the power of the court to disbar is taken away when its power over admission is destroyed. Of course it is possible for the Legislature to make disbarment a punishment for an offence, and the courts will enforce it accordingly; but this does not militate against the doctrine that the courts have an inherent power to disbar. This power follows from the fiduciary nature of the attorney's relation to the court, and Chief Justice Doe is probably justified in concluding, in his admirable discussion of the history and nature of the attorney's office, the power existed at common law.<sup>4</sup> The earliest general statute upon the subject of disbarment summarized in Chief Justice Cartwright's opinion, treats disbarment as part of the same subject as admission.<sup>5</sup>

The power to disbar has been said by the Supreme Court of the

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<sup>1</sup> It has been held that the acceptance by the court of a surety on a judicial bond is a judicial act, and the Legislature has no power to compel the court to accept certain corporations as sole surety. *In re American Banking and Trust Company* (Orph. Ct.), 17 Pa. Co. Ct. R. 274, 280 (1895); 4 Pa. Dist. R. 757; 26 Pittsburg L. J. N. S. 213; 37 W. N. C. 297.

<sup>2</sup> 39 Wis. 232, 239 (1875).

<sup>3</sup> *In re Mosness*, 39 Wis. 509, 511.

<sup>4</sup> *Ricker's Case*, 66 N. H. 207, 213, 214; S. C. 29 Atl. Rep. 559, 562 (1890). In that case an unmarried woman was admitted to be an attorney.

<sup>5</sup> 4 Hen. IV. c. 18, sects. 1, 2 (1402); 2 Pickering's St. at Large, 438.

United States to be possessed by all courts which have authority to admit attorneys to practise.<sup>1</sup> It exists independent of any rule or statute.<sup>2</sup> The powers of admission and disbarment are necessarily inseparable, and equally inherent in courts of justice.

In the case of *Randall v. Brigham*,<sup>3</sup> the Supreme Court of the United States, speaking through Mr. Justice Field, held that an action for damages would not lie against a judge for disbarring an attorney; and the court say, "Both the admission and removal of attorneys are judicial acts." Other cases to the same effect are collected in *Weeks on Attorneys*, 2d ed. 157, where the same reason is given.

The power of the Legislature over the courts in judicial matters is exceedingly limited, and can in no way be exercised so as to impair the independence of the judiciary. Perhaps the leading case upon this subject is that of *Houston v. Williams*, 13 Cal. 24 (1859),<sup>4</sup> in which the court refused to give the reasons of its decisions in writing, although so required by statute. In like manner the Legislature cannot, in the absence of constitutional provisions so authorizing, limit or restrict the inherent power of courts to punish for contempt.<sup>5</sup> This doctrine has recently received a most emphatic confirmation in an elaborate opinion by the highest court of the State of Virginia, in the case of *Carter v. Commonwealth*,<sup>6</sup> in which the court say:—

"Reading the constitution of the State in the light of the decisions of eminent courts which we have consulted, we feel warranted in the following conclusion: That in the courts created by the constitution there is an inherent power of self-defence and self-preservation; that this power may be regulated, but cannot be destroyed or so far diminished as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in, and to be exercised by, the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury."

<sup>1</sup> *Ex parte Robinson*, 19 Wall. 505, 512 (1873).

<sup>2</sup> *Weeks on Attorneys*, 2d ed., 154; 3 Am. & Eng. Enc. Law, 2d ed., 300; *State v. Judge*, 49 La. An. 1015, 1018 (1897); *Moutray v. People*, 162 Ill. 194, 197 (1896).

<sup>3</sup> 7 Wall. 523, 535 (1868).

<sup>4</sup> Followed in *Vaughn v. Harper*, 49 Ark. 160; 4 S. W. Rep. 751 (1887). See also *Ex parte Griffiths*, Reporter, 118 Ind. 83 (1889); 10 Am. St. Rep. 107; 3 L. R. A. 398, acc.

<sup>5</sup> *In re Shortridge*, 99 Cal. 526, 532; 34 Pac. Rep. 227; 37 Am. St. Rep. 78 (1893); 6 A. & E. Enc. Law, 2d ed., 104, citing numerous cases.

<sup>6</sup> 32 S. E. Rep. 780, 785 (March 16, 1899).



The appointment of assistants to the courts in their judicial *duties* cannot be controlled by the executive or Legislature. A powerful statement of this doctrine will be found in the case of State, *ex rel.* Hovey, *v.* Noble,<sup>1</sup> in which the Supreme Court of Indiana held that an act providing for the appointment by the Legislature of commissioners to assist the Supreme Court was unconstitutional. The court say, in the course of the opinion : —

“A department without the power to select those to whom it must intrust part of its essential duties cannot be independent. If it must accept as (ministers and assistants), as Lord Bacon calls them, persons selected for them by another department, then it is dependent on the department which makes the selection. To be independent, the power of the judiciary must be exclusive, and exclusive it cannot be if the Legislature may deprive it of the right to choose those with whom it shall share its labors or its confidences. If one kingdom possesses the right to send into another ministers and assistants to share with the governing power its functions and duties, the latter kingdom is in no sense independent. . . .

“It is, however, unnecessary to multiply authorities, for it cannot be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as assistants to the judges in the performance of their judicial functions, whether they be referees, receivers, attorneys, masters, or commissioners.”

The control by the Legislature of admission to the bar, so far as it exists under the usual American constitutions, is at most a power to prevent the admission of unsuitable persons. It may be that the Legislature, within reasonable limits, can provide who shall not be admitted to the bar, provided they do not transgress other constitutional limitations besides the one dividing the powers of government, but the Legislature certainly has no positive power to compel the courts to admit persons to practise before them. Indeed, the true rule as to the limit of the legislative power in the matter of attorneys would seem to be much the same as in cases of contempt proceedings. The Legislature may regulate such proceedings, so long as it does not impair the power or the authority of the courts to protect themselves and maintain their efficiency and independence. Actuated by motives of courtesy to a co-ordinate branch of the government,<sup>2</sup> the court will regard reasonable

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<sup>1</sup> 118 Ind. 350, 356, 357, 360 (1888).

<sup>2</sup> Compare Goodell's Case, 39 Wis. 232, 239 (1875).

enactments regulating admission of attorneys. But the moment the Legislature by a law, couched in whatever form, negative or affirmative, forbids the court to inquire into the merits of the applicant, or impairs the power of the court to control its own officers, the members of its bar, resistance to such a law becomes the duty of every self-respecting court.

The clause providing for admission on diploma in the Illinois act of February 21, 1899, seems to be an assumption by the Legislature of judicial power, not only because it forces the admission of certain described persons on the court as officers, but also because of the way the act goes about it, since the diploma is in effect made conclusive evidence of the intellectual qualification of the applicant, and the court is not permitted to inquire into the actual fact. On producing this diploma, and the usual proofs of good moral character, the court *shall* thereupon grant the license. "The Legislature cannot indirectly dispose of cases by prescribing conclusive rules of evidence."<sup>1</sup>

An interesting case on this question is that of *Wantland v. White*,<sup>2</sup> in which the act of Congress providing that the oath of enlistment taken by the recruit shall be conclusive as to his age, was declared unconstitutional. The court say: "It has been held, and it would seem that the decision must be correct, that it is unconstitutional for the legislative power to declare what shall be conclusive evidence, and in fact such declaration would seem to be a judicial act in each given case." In this case the guardian was allowed to recover his ward, who had taken the oath of enlistment under age.

In the case of *United States v. Klein*,<sup>3</sup> the Supreme Court had occasion to consider an act of Congress which provided that under certain circumstances the acceptance of a pardon from the President should be taken and deemed in suits in the Court of Claims, and an appeal therefrom, "conclusive evidence that such person did take part in and give aid and comfort to the late rebellion." The court says, by Chief Justice Chase, "In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect of evidence which, in his own judg-

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<sup>1</sup> 6 Am. & Eng. Enc. of Law, 2d ed., 1050; Cooley's Principles of Constitutional Law, 3d ed., 46.

<sup>2</sup> 19 Ind. 470, 472 (1862). For this citation I am indebted to Professor J. H. Wigmore.

<sup>3</sup> 13 Wall. 128, 146, 147 (1871), 20 L. Ed. 519.



ment, such evidence should have, and is directed to give it an effect precisely contrary. We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power." (The dissenting opinion goes upon other grounds.) It has been intimated, however, that the Legislature has power to make evidence which logically tends to prove a certain proposition, conclusive on the court,<sup>1</sup> although the case itself by no means called for such strong doctrine.

It is surprising how few cases upon statutory rules of evidence present the bare question of the line of demarcation of the judicial power, although there are many where the question is involved along with other constitutional limitations, such as the deprivation of property without due process of law.<sup>2</sup>

In the matter of Cooper,<sup>3</sup> the court (Chief Justice Comstock dissenting), upon an *ex parte* hearing, overruled a unanimous decision of the Supreme Court,<sup>4</sup> which had refused admission to the bar to parties presenting law-school diplomas. The case holds that attorneys are officers of the court, and that their admission is a judicial act,<sup>5</sup> and disposes in short order of the fundamental objection that the diploma is made conclusive evidence, as follows: "There are, no doubt, some restrictions upon the power of the Legislature to prescribe rules of evidence, as otherwise it might subvert some of the most valuable guaranties contained in the Constitution. These restrictions have never been judicially defined, but they clearly do not reach the present case."<sup>6</sup> The elaborate brief of Professor Dwight in this case contains much of the ancient learning on the subject, but the brief is naturally not conceived in a judicial spirit, and is quite as interesting for what it omits, as for what it contains. The power of the judges to give a remedy to a person properly qualified for the bar, who had been rejected by the Inns of Court, is never mentioned; nor was the attention of the court called to the fact that the earliest acts of Parliament upon the subject do not confer, but restrict, the judges' power to admit.<sup>7</sup> It was very unfortunate that the case was argued only on one side;

<sup>1</sup> *In re County Seat of Linn County*, 15 Kan. 500, 528 (1875), opinion by Brewer, J.

<sup>2</sup> See, for example, *Marks v. Hanthorne*, 148 U. S. 172, 182 (1892).

<sup>3</sup> 22 N. Y. 67 (1860); 11 Abb. Pr. 301.

<sup>4</sup> Reported in 10 Abb. Pr. 348; 31 Barb. 353; 19 How. Pr. 97, 136.

<sup>5</sup> 22 N. Y. 84.

<sup>6</sup> 22 N. Y. 93.

<sup>7</sup> *E. g.* 15 Edw. 2 Stat. Carlisle, c. 1 (A. D. 1322); Maugham, Attorneys, App. viii.

and when the court below found out what had happened in the Court of Appeals, they protested against the way in which a reversal of their judgment was obtained, without notice to any one.<sup>1</sup> Professor Dwight's argument is misleading where he asserts that the discretion of the Inns of Court in admitting barristers is uncontrollable. The authority he cites (*King v. Benches of Lincoln's Inn*<sup>2</sup>) does not support this proposition, but intimates plainly that there is a remedy by appeal to the twelve judges, in their capacity as visitors. And undoubtedly this remedy existed.<sup>3</sup>

Dugdale's "*Origines Juridicales*" abounds with instances of the orders of the judges in their capacity as visitors of the Inns of Court, — sometimes purporting to be by command of the King, or King and Council,<sup>4</sup> sometimes assented to by the benches of the Inns,<sup>5</sup> but frequently by the judges of their own motion and authority; as, for example, in the 33d year of Elizabeth (1591), regulating the readings,<sup>6</sup> in 1627, for the government of the readers,<sup>7</sup> and in the first year of Queen Elizabeth (1558), on All Souls Day, we find such orders regulating apparel, including the interesting provision, "that no fellow of those Societies should wear any Beard above a fortnight's growth."<sup>8</sup>

The act in question in Cooper's case is to be found in New York laws of 1860, p. 342, and was passed on April 7 of that year. It provided for an examination in every case by a committee of three lawyers before a diploma was granted.

In justice to the New York court, it ought to be said that very likely they construed the act as making the diploma not conclusive, but only competent, evidence.<sup>9</sup> The matter in New York was also complicated by the peculiar provision in that State in the Constitution of 1846, which took away the power of the judges to appoint attorneys conferred by the Constitution of 1777. The court said,<sup>10</sup> "Whenever an applicant is found to possess the requisite qualifications, the constitution, by its own inherent energy, appoints, *i. e.*, it gives the applicant an absolute title to the office, which is equiv-

<sup>1</sup> 20 How. Pr. 17; 11 Abb. Pr. 301, 337.

<sup>2</sup> 4 Barn. & Cress. 855, 858, 859, 861 (1825).

<sup>3</sup> *King v. Benchers of Gray's Inn*, 1 Doug. 353, 354 (1780); *Boorman's Case*, March, 177 (1666).

<sup>4</sup> *E. g.* at pp. 312, 317, 320, 322 (2d ed. A. D. 1671).

<sup>5</sup> *E. g.* at pp. 313, 316.

<sup>6</sup> P. 313.

<sup>7</sup> P. 319.

<sup>8</sup> P. 311.

<sup>9</sup> 22 N. Y., p. 93. Cf. *Matter of Burchard*, 27 Hun, 430, 434.

<sup>10</sup> *Ib.*, p. 94.



alent to an appointment." If this is true, it seems fair to say that the common-law discretion of the judges in admitting to the bar, which exists under the normal American constitution, did not then exist in New York. The unfortunate results of the decision in *Ex parte Cooper*, in the way of special legislation admitting to the bar on diploma, may be found set forth in the Matter of Burchard<sup>1</sup> and the reports of the New York State Bar Association.<sup>2</sup>

The practice of admitting to the bar without examination, upon production of a diploma from a law school, is said still to exist by law in Alabama, Georgia, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, and Wisconsin.<sup>3</sup> The decision of the Illinois Supreme Court goes no further than to hold that a statute requiring such admission is unconstitutional.

If the examinations in any State are of such quality that a diploma is more trustworthy than the certificate of the examiners, there is no constitutional objection to a court's admitting *in its discretion*, on diploma, or admitting on no evidence at all. Deliberate attempts by the Legislature to alter the rules of the Supreme Court on this subject, such as occurred in Illinois, are fortunately rare. But it ought to be clearly understood that the responsibility of admission is in all cases upon the courts, not the Legislature, and a legislative disregard of constitutional limitations ought not to be encouraged by an excess of judicial courtesy. A court would certainly best consult its dignity, and facilitate its own labors as well as protect the public, by requiring unquestionable proof of a high standard of attainment from all who seek admission to its bar.

*Blewett Lee.*

CHICAGO, September 5, 1899.

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<sup>1</sup> 27 Hun, 429, 438 (1882).

<sup>2</sup> Vol. 4, p. 50; vol. 5, p. 71.

<sup>3</sup> Proceedings Illinois State Bar Association, 1898, p. 134.

## THE PERMANENCE OF PARLIAMENTARY GOVERNMENT.

THE article on this subject in the June number of this Review is important enough to justify a somewhat rigid analysis, while the signature of Mr. Dicey doubles the delicacy and difficulty of criticism. To express doubt as to the permanence of parliamentary government is a much more serious thing than appears on the face of it, the degree depending a good deal on accuracy of definition. If by those words is meant government as it is carried on in Great Britain, it may be said at once that there is no other like it in the world. Thus the sole initiative in public legislation, especially as to finance, on the part of the ministry, is unique and peculiar to Great Britain. It exists in no other country. Yet it may well be said to be the root and basis of the British system. There are minor differences, such as in the exercise of the right of dissolution, the consolidation of parties, and an organized opposition under leadership as definite as that of the prime minister, which create a marked distinction between the British and all other existing forms of representative government.

If by parliamentary government we mean that which implies the existence of a representative body, the question at once arises, representative of whom? The English government of to-day differs quite as much from that of 1830, as the latter did from the Aulic council of Vienna, or from the depositaries of power in Russia. No government directly representative of universal suffrage ever existed till after the first third of this century. Inferences from such brief experience must be accepted with caution.

Another apparently subtle yet vital distinction is between government with and by a representative body. We have attempted elsewhere to show that governments in which, whatever may be the constitutional theory, the whole power is practically concentrated in the hands of a legislature, always has ended and must always end in failure, as illustrated by the Long Parliament in England, by the various French Revolutions, and by the existing governments of France, Italy and the United States. The real and unsolved prob-



lem of the future is whether a practicable and permanent working relation can be established between the legislative and executive branches. It is the distinction and the glory of Great Britain to have attained, far nearer than any other country, to a successful solution of this problem.

The Century dictionary defines parliament as

"A meeting or assembly of persons for conference or deliberation; an assembly of the people or their representatives to deliberate or legislate on national affairs."

The Imperial (English) dictionary of 1882, using the same words, adds: —

"A supreme national or general council."

Both agree that the word is not generally used to include the sovereign.

The Encyclopedia Britannica gives as its sole definition of the word parliament, —

"The British Parliament is the supreme legislature of the kingdom of Great Britain, consisting of the King or Queen and the three estates of the realm, viz. the Lords Spiritual, the Lords Temporal and the Commons."

One may be pardoned for being at a loss to know what it is of which Mr. Dicey doubts the permanence.

If we assume that parliamentary government is identified with a representative body, and that that government is to come to an end, what is to take its place? Is it to be a feudal aristocracy or a single despot? It seems hardly possible that there can be any permanent or material restriction of universal suffrage unless through the employment of force. Is the world to be governed by individual rulers, chosen by a *plebiscite*, with consequences like those resulting from the two Napoleons? Or is the succession to be determined like that of the sultans of Turkey, or the Roman emperors installed by pretorian guards?

With every additional decade of the sway of universal suffrage, the older sources of authority, birth, wealth, and even the higher education, are losing their hold. A substitute for the at least theoretical free representation of universal suffrage can only result from physical force. The methods of parties in the United States indicate very strongly the process by which that force is likely to be evolved.

Mr. Dicey says — and it is a proposition with which we heartily concur —

“that parliamentary government is nothing else than a more or less recently invented piece of political mechanism, and is, like other products of human ingenuity, such as, for example, the steam engine or the electric telegraph, adopted in one country or another, in part at least because of its proved utility.”

Now the first test of the excellence of any kind of machinery is whether it is suited to obtain the best results from the particular force employed. If from the failures of the first machinery for steam and electricity it had been concluded that those forces were unavailable in practice the world would hardly be where it is today. By the same analogy the important subject of inquiry is not whether parliamentary government should or will be abandoned, but whether its machinery as employed is adapted to this immense new force of universal suffrage.

A great many persons, even of high intelligence and education, express great contempt for any theory of improvement in machinery or organization in politics, holding that the people must do their own work if it is to be done at all; that if universal suffrage produces bad results, it is because the force is bad and no tinkering of the machinery will do any good. They might as well say the same of steam and electricity and of the efforts made to obtain the best results from those forces.

There is one great difference, however, between the two cases, that with steam and electricity the whole human intellect and energy was applied, without any opposition, to the attainment of the highest results. The stimulus of individual gain secured the most intense concentration of brain power to the improvement of the machinery, while the mass of business energy and enterprise — not the least characteristic feature of the century — stood ready to seize the intellectual achievements, and carry them in practice to the utmost fruition. In the case of government, on the contrary, individual greed, ambition and intrigue are by no means aiming at the highest results of the representation of universal suffrage for the general welfare. So far from this, they aim to control this immense force for their private advantage. This does not mean, however, that the problem in the case of government is different in itself, but only that it is immensely more difficult of solution.

Mr. Dicey speaks of the English constitution almost as if it was



a definite entity or instrument like that of the United States. Apparently, however, most English writers, including himself, admit that that constitution is merely a bundle of traditions and precedents, so that it may be said that the English nation transformed the constitution and not the constitution the English nation. In fact they have constantly acted and reacted upon each other.

The qualities of that constitution we attribute to two conditions by which great Britain is distinguished from other European countries: first, the security from foreign invasion which enabled the nation to refuse a standing army to the crown, unless accompanied by a redress of civil grievances; and, second, the expulsion of the Roman Catholic church, thus getting rid of the foreign corporation and distributing its property into native and lay hands. These things enabled and induced the upper and middle classes, which alone had any share in the government, to work together against the crown, while the requirements of government taught them, in their own interest, to maintain a strong executive, who could be held responsible for its conduct.

Mr. Dicey then argues that the annals and experience of England make it very doubtful whether her institutions can be transplanted to other countries which have different conditions, though their desire for parliamentary government is supposed to be proved by its expansion throughout the world. He concludes, however, that this is the "influence in human affairs of imitativeness," and that other countries have sought in Great Britain "the reigning fashion of the day." We can hardly accept this tribute to British self-satisfaction. The first French Revolution has probably had more influence upon European continental affairs than the British constitution, and that influence was founded more upon the ideas of Jean Jacques Rousseau and the Encyclopædists than upon those of Blackstone and Locke or even Montesquieu. It was one of the first steps towards the development of the modern force of universal suffrage, for though it did place some restrictions, it was conducted by bourgeois or men of the middle class, and favored elections in the second degree, yet in its doctrine of human political equality it went far beyond what was then contemplated in Great Britain or the United States. The novelty and the object aimed at were the employment of this force. What was adopted from Great Britain was the only known machinery for such employment.

To this day such adoption has been very imperfect in any

country. Thus the French Revolution evolved only a single despotic chamber with no separate executive at all; an organization which handed over the country to Napoleon not much more quickly than a similar experiment threw England into the hands of Cromwell. As already remarked, the sole initiative in legislation, the formation of an opposition as completely organized and under individual control as the party of government, the protection of the executive by dissolution of the legislature and appeal to the country; these things are still almost wholly wanting to the governments of continental Europe.

When Mr. Dicey says "Faith in Parliaments has undergone an eclipse," it seems a fair construction of his article to say that he means parliaments outside of Great Britain. No doubt there are many gloomy forebodings even in England, as to the effect of coming democracy upon parliament; but that there is any considerable number of Englishmen prepared to give up parliamentary government altogether and embark upon the sea of revolution which that implies is a proposition we should be very slow to accept. If the distrust is of universal suffrage itself, that is quite a different question. There is a wide distinction between the character of a force and that of the machinery for its application.

Mr. Dicey continues:—

"In proportion as the area of representative government has extended, so the moral authority and prestige of representative government have diminished."

But he gives an ample explanation on the next page:—

"In 1848 there was not a friend of freedom or progress throughout Europe who did not believe that the extension of representative institutions, of one kind or another, throughout the civilized world would confer the greatest benefit on mankind. . . . Compare, now, this universal faith which marked the middle with the skepticism which marks the close of the nineteenth century."

Such a comparison merely proves that the over-wrought imaginations of men sowed the seeds of disappointment, just as they did at the outbreak of the first French Revolution. Does it in any way prove that parliamentary government is not better than anything which preceded it? We again insist upon the difference between a force and the machinery for applying it. What the men of 1848, and indeed minds of a certain quality ever since our Declaration of Independence, looked forward to with hope and



rejoicing was the idea that the multitude of mankind should have some voice in the government under which they live, instead of living like dumb beasts under such government as a small number of persons, regarded through birth and wealth as superior beings, might vouchsafe to give them. Whether the machinery was adequate for the purpose was a wholly different question. In a general way they expected the end to be obtained through representative bodies, and even assumed that government could be carried on by representative bodies. It is the explosion of this fallacy which underlies the depression and distrust of what Mr. Dicey calls parliamentary government.

The quality of every government, as of every private enterprise, must depend upon the quality of the executive power. All that a legislature can do is to secure the best executive and to see that it exercises its power for the general welfare. The failure of parliamentary government is more than anything else owing to the constant and uniform endeavor of the representative body to displace and substitute itself for the executive power; a condition so fruitful of evil that it inevitably ends in popular acquiescence in the suppression of the legislature by the executive and the recurrence of the dreary round of despotism.

Mr. Dicey assigns five distinct reasons for the decline of parliamentary government, but they may all be said to be comprised in the last.

"Parliaments have suffered in credit because they have of recent years been set to do work for the performance of which they are unfit."

Is it not conceivable that before parliaments are abolished they should be set to do work for which they are fit? Mr. Dicey says very truly, —

"Now for purposes of destruction a popular assembly is the best of instruments;"

and instances the Long Parliament and the French National Assembly. The reason is that for destruction only a common assent is required. A mob, if not interfered with, can destroy anything. But for construction and the continuous administrative work of government a parliament and a mob are alike impotent. For such work a single executive head, or at least a limited number of heads, with subordination and discipline is indispensable.

It is because parliaments insist upon taking executive power into

their own hands and have failed in the exercise of it, that they have fallen into discredit. If they can be made to understand that their business is not to govern, but to see that those who do govern shall do so in the public interest; if they can be compelled to limit themselves to their proper function of critics with the power of the purse, they may yet regain their credit and accomplish at least a large part of what was expected of them.

It is of course true that a parliament is and must be the legislative branch of government. But if such a body has unlimited power of legislation, it will sooner or later reduce not only the executive but the very society which has elected it to be the mere instruments of the caprices and passions of its members; and it will arrive at this result by means of its committees, whether elected or appointed by a speaker. The vital question to be resolved is how can its legislation be limited and guided with a view to the public welfare. It is Great Britain alone among the nations which has approached a solution of this question; and she has done this by taking away the initiation of legislation, at least in all matters of public interest, from the parliament and handing it over to the executive ministry. No legislation of that kind can be proposed by anybody but the ministry, though it may in general terms be demanded of or proposed to them by members of the parliament. That body decides whether the ministry shall or shall not take up any question, and if they have taken it up, whether the measures submitted by them for the settlement of it shall or shall not be accepted. In other words, the veto rests with the parliament and not, as in other countries, with the executive. If the ministry does not secure the approval of the majority of parliament it resigns and makes way for another, which takes up the same powers and the same responsibilities, though the former retains, as a defence against factious opposition and the tyranny of a majority, the power of dissolution and appeal to the country. It is these things which make a sharp distinction between the British and all other forms of representative government and cause British writers to say, though they do not use quite such broad language, that while their own has been a success, all others have failed. How far it is possible to arrive at similar results on the continent of Europe or in the United States, and how closely for that purpose, or with what modifications, it is necessary to copy the British machinery, is too large a subject to be discussed in this article. All that is here attempted is to show that Mr. Dicey has



included in one proposition, implying a categorical answer, a number of different problems capable of a variety of solutions; has assumed that modern government has taken one definite road, upon which the only alternative is to go directly forward or directly back.

*Gamaliel Bradford.*

NEW JERSEY AND THE GREAT  
CORPORATIONS.<sup>1</sup>

## II.

I HAVE given some of the reasons why the corporations choose New Jersey as their domicile; but this does not answer the question which seems to be more urgent at the present time, why New Jersey permits her laws to be made use of for the purpose of giving legal form to those great aggregations of rival enterprises which have been condemned in other States as combinations in restraint of trade and against public policy. How can she justify the fact that she permits and even encourages the formation of corporations which apparently accomplish the same result as the forbidden trusts?

The question is a broad one, and New Jersey has not attempted to give an answer to it. She has simply acted under the well-established policy of encouraging the aggregation of capital for business purposes, and has found herself suddenly confronted with a new condition arising out of an unexpected development in the world of trade and industry.

The difficulty is that there is nothing really new in the situation, except the extraordinary size of the corporations, the large amount of property controlled, and the vast extent of their enterprises. Their appearance is alarming; but after all, the size is only the result of unduly rapid growth, and it is not easy at once to devise means to check over-growth without risk of destroying the life. Combination of capital has become a necessary part of the social organization, and it is hard to stop it at any particular point in its development. The corporation has become the established means of uniting the money and energies of individuals to accomplish large undertakings, and there is no ready rule of law or of political economy to be applied to determine to what extent they shall grow, or how much property they shall acquire.

Look, for example, at the corporations by which the most extensive combinations of rival industries have been accomplished, and

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<sup>1</sup> An address delivered before the American Bar Association at Buffalo, August 28, 1899. Continued from page 212.



it will be seen that they are exercising only the ordinary powers which have always been conferred upon ordinary business companies. The owners of mills in various parts of the country, tired of the struggle of ceaseless competition among themselves, are convinced that the cost of production can be diminished and the profits of the business increased by combining all under one ownership and control. They form a corporation under the laws of any State where corporations with ordinary powers are permitted to be formed. The value of the property and business of each is estimated as nearly as may be, and then they are sold to the new corporation for the prices agreed upon, and paid for in money or stock, as the parties may choose. The proceeds of the sale are divided among the stockholders, and the new corporation becomes the owner of the property and business of all the old ones, and proceeds to manage the business in such manner as may seem best to its stockholders and directors. It exercises the rights of ownership, and there is nothing in the ordinary rules of law that limits the amount of the property to be held, or the extent of the business to be controlled.

It is true that every State may limit the sphere of the action of its corporations. It may decline to give them power to hold property or carry on business outside of its own borders. It may confine the privileges of incorporation to its own citizens. It may compel their directors to hold their meetings and transact their business within the State; it may even limit the amount of property which they shall acquire; but unless it is willing to adopt this policy of close restriction, it cannot control the extent of the business that they shall carry on, or the number of rival manufactories that they shall absorb.

It is true that there are provisions in the statutes of New Jersey which make it easy for combinations of rival enterprises to form corporations under her laws. There is the provision that corporations may hold property and transact business in other States; but she is certainly not prepared to say that her business corporations shall not have the privilege possessed by every citizen of engaging in interstate commerce and holding property beyond the narrow limits of the State. There is the permission to directors to have an office and hold their meetings outside of the State; but this has been given for the last twenty-four years, and so long as careful provision is made for actually and constantly maintaining the principal office at a definite place within the State,

and so long as men of other States have their money invested in her corporations, she will not, without urgent reason, change her law so as to put them to the inconvenience of holding every meeting of the directors within her own borders.

She might insist on the close supervision of corporate business, require the filing of detailed reports of debts, assets, and earnings. She might levy taxes in such a way as to expose the company to the extortion of officials, or to make its business uncertain and the burdens oppressive; but these are questions of local policy which concern her dealings with all her corporations, and they are not to be settled with a view only to the effect of her policy upon the acquisition of property and the control of business in other States. With respect to reports of debts and earnings, she may well take the ground that the requirements of the stock exchange are more efficient than statutes in securing to the public a proper acquaintance with the condition of such corporations as are of public concern.

The most important provision with respect to the formation of large combinations is that which permits the purchase of stock of other corporations. It was under this that the Standard Oil Trust and other trusts were reorganized as corporations in New Jersey; but the same provision was adopted in New York as early as 1892, and has since been adopted in many other States, and, as I have already pointed out, this privilege is not necessary to the combination of several companies into one. It is quite possible, and it is now the common practice, for the new corporation to purchase the property itself and not the stock of the old companies. It is only a matter of convenience in some cases to purchase the stock and keep the old companies alive; but if it be forbidden to purchase the stock, there is nothing to prevent any one from buying the property, nor can the stockholders of the companies that sell their property be prevented from accepting stock in the new company in payment for their shares in the proceeds.

One of the inducements to the promotion of large corporations and the combination of industrial properties is the inflation of stock, and the creation of fictitious stock is one of the most serious evils of the whole movement.<sup>1</sup> This can be discouraged, though not wholly prevented, by the requirement that nothing but money

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<sup>1</sup> *Wetherbee v. Baker*, 35 N. J. Eq. 501-512; *Edison v. Electric Imp. Co.*, 50 N. J. Eq. 354 (1892).



shall be taken in payment of capital stock. The laws of New Jersey provide that stock may be issued for property purchased, and the property must be put in at a fair and *bona fide* valuation; yet under the decisions of the courts, and now under the statute, in the absence of fraud in the actual transaction the judgment of the directors as to the value of the property purchased is conclusive.<sup>1</sup> In this condition of the law it is impossible wholly to prevent undue inflation of the stock; but the true remedy is not in forbidding the issue of stock for property furnished, nor even in limiting it strictly to the value of the property. Some allowance must be made for the earning power of the property and business under the control of the new corporation, and some inducement of a speculative nature must be given to tempt capital into new and doubtful enterprises. It is stockholders and creditors that are chiefly interested in knowing what the property for which the stock is given is really worth, and they have full protection if they can ascertain what that property really was. The English plan is to punish promoters severely for issuing a false prospectus, and to require the contract for the purchase of the property to be written in detail, and give to anybody the right to obtain a printed copy of it for sixpence. New Jersey would do well to adopt both of these precautions against undue inflation, and she ought also to do away with that provision of a statute of 1893 by which, on the consolidation of two or more corporations, the amount of the capital stock may be fixed by agreement of the directors without any reference whatever to the amount of stock or property of the companies so combined.<sup>2</sup>

I cannot go in detail into the question of remedies. I have only referred to some of the chief characteristics of the law under which the great corporations are organized in New Jersey, so as to show that after all they are the provisions that are common to all companies, and are for the most part provisions that have been in force for many years, and that changes sufficient to effect a serious restraint upon the great industrial combinations would involve changes in the established policy of encouraging and protecting the aggregation of capital for the ordinary and necessary promotion of manufactures and industries of every kind. The fact is, as I have said before, that it is the great size of the new corporations

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<sup>1</sup> *Bickley v. Schlag*, 46 N. J. Eq. 533; *Vail v. Phillips*, 14 N. J. Law Journ. 45.

<sup>2</sup> Laws 1893, p. 121. See also 1883, p. 242; 1888, p. 441.

and the extent of their property and business that makes the difference between them and those we have been accustomed to, and we have not yet found rules of policy by which to foster the one and discourage the other.

There are other States in which the great combinations of capital have agitated the public more strongly than in New Jersey, but in looking over the recent legislation of these States I find it strangely ill-adapted to the latest forms which these combinations have assumed. The legislation is called "Anti-Trust" legislation, and the laws, even the latest of them, are directed against "trusts" or combinations and agreements in restraint of trade. These are treated as in the nature of a conspiracy, and agreements of that character are made invalid and the acts described are indictable as misdemeanors. These statutes were directed against those combinations which consisted in agreements among rival corporations and took the form of "trusts," the stock of each company being assigned to trustees, who directed the policy of all the companies, regulating production, avoiding competition, and fixing the prices of the products. There were undoubtedly combinations and agreements, and they were declared to be illegal as in restraint of trade and creating monopolies; and this form of combination was therefore abandoned, and the simple one adopted by which the property of all was transferred out and out to a new corporation.

The name of "trust" is still applied in popular parlance to the large corporations, but in the application of a criminal statute it is hard to distinguish between two corporations formed under the same laws so as to denounce upon one the punishment prepared for the "trust" and to leave the other free to carry on its affairs. Proof of this is found in the difficulty the courts have had in enforcing these statutes, because the language used to define a trust or a contract in unlawful restraint of trade is broad enough to cover acts that are by common consent perfectly lawful, and such reasonable restraint of trade as has always been held to be legal.

In examining the decisions based upon the common law it will be found that in most of the cases it has been agreements that were declared to be illegal as in restraint of trade. It is the agreement that the courts refuse to enforce as being against public policy, and it is the agreement that is a conspiracy against the public welfare and indictable. But however reprehensible may be the means by which the organization of the corporation has been brought about, it is difficult to treat the existence of a corporation



lawfully formed as an agreement in restraint of trade, or to hold the ownership of all the flour mills that can be purchased to be an indictable conspiracy. There are cases in which it has been held that the objects of a corporation were illegal when it was formed in pursuance of an arrangement for purchasing all the available manufactories in the country, and the purpose of its existence was to control prices and create a monopoly in one of the necessary articles of commerce. Such were *Richardson v. Buhl*<sup>1</sup> in Michigan, *Distillery and Cattle Feeding Co. v. People*<sup>2</sup> in Illinois, and *State v. Nebraska Distillery Co.*<sup>3</sup> in Nebraska. In the first of these the decision of the court on this point was not within the issues argued by counsel, and the real point of the case was that the contract was void by which the plaintiffs had sold their property to the corporation. The other two cases were on proceedings in *quo warranto*, and the organization of the companies was annulled. In direct proceedings against the corporations it was held that they were formed for an illegal object and should be dissolved.

The fact remains that the legislation against trusts and combinations as conspiracies fails to reach the corporations already organized, however large they may be or however large a part of the trade they may control. It is just here that the policy of New Jersey is different from that which seems to prevail in the greater number of States. In New Jersey, it has been held that in a collateral proceeding the Court of Chancery has no power to restrain a corporation organized under the forms of law from performing acts within its corporate power merely because the purpose of its incorporation may have been to prevent competition and establish a monopoly;<sup>4</sup> and in a very recent case in the Court of Errors<sup>5</sup> it has been held that although contracts in restraint of competition in the production of some commodity in the production and sale of which the public have an interest are contrary to public policy, yet when such agreements result in the formation of a corporation with the powers conferred under the liberal statutes of New Jersey, it may lawfully buy the business of its competitors, and the courts cannot pronounce a contract for such permitted purchases invalid, although it may tend to produce, and may temporarily produce, a monopoly.

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<sup>1</sup> 77 Mich. 632

<sup>2</sup> 156 Ill. 448.

<sup>3</sup> 29 Neb. 700.

<sup>4</sup> *Attorney-General v. American Tobacco Co.*, 55 N. J. Eq. 352.

<sup>5</sup> *Trenton Potteries Co. v. Oliphant*, 43 Atl. Rep. 723.

I may quote the language of the Chief Justice as a clear statement of the opinion of the highest court of New Jersey on this subject. It was a case in which a corporation was formed for the purpose of buying the entire property of other corporations and carrying on their business, and the purpose was to control the business of that character throughout the greater part of the United States. The selling companies agreed not to engage in that business in any State in the United States, except in the State of Nebraska and the Territory of Arizona. A bill was filed to restrain the defendants from continuing to engage in that business. It was insisted that the contract could not be enforced because it was made in pursuance of an unlawful plant which was in restraint of trade and tended to create a monopoly.

After showing that an individual might lawfully purchase one rival business after another until he had, for the time at least, completely excluded competition, and that the courts in the absence of legislative restrictions, if such could be imposed, had no power to prevent it, and after referring to the liberal powers conferred on corporations for acquiring and holding property of every kind, including the stock of other corporations, the Chief Justice said: "Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The Legislature might have withheld such powers or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the Legislature authorizing and permitting acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time at least destroy, competition. Contracts for such purchases cannot be refused enforcement."

A petition for a rehearing of this cause has been filed, and although the opinion of the court was unanimous, it is possible that after further argument a different conclusion may be reached.<sup>1</sup>

The court has declared in this opinion that "contracts by independent and unconnected manufacturers to control the prices of

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<sup>1</sup> The court has since refused to grant a rehearing.



their commodities, either by limitation of their production or by restriction on distribution, or by express agreement to maintain prices, are without doubt opposed to public policy ; " but it decides that a corporation having once been formed under statutes which authorize corporations to acquire and hold property of every kind in the same manner as individuals, the corporation must be regarded as possessing all the powers incident to the acquisition of property, and that contracts made for the protection of that property must be maintained.

If this conclusion is sound, then it will follow that the contrary conclusions in other States must ultimately be abandoned, and the "trusts" so widely condemned will be generally established under the form of great corporations which will accomplish substantially the same purpose as the combinations made between independent dealers and manufacturers.

However this may be, the practical question to be considered is, how we shall deal with the great combinations of capital in their new form as corporations. Shall we apply to them the rules of law and principles of public policy that are applied to corporations in general, making only such changes as new conditions and new dangers seem to suggest, or shall we regard them as something altogether new and monstrous, a class by themselves, enemies of society, and beyond the pale of the law?

It is insisted that because the objects they accomplish are the same as those of the trusts, and the trusts have been held to be illegal as monopolies and contracts in restraint of trade, the great corporations must, therefore, be treated as illegal, their corporate franchises revoked, and their property taken away from them. The difficulty is to distinguish between one corporation and another, and to make any uniform law that shall strike at the large corporations without affecting the ordinary rights of property and discouraging the combinations of capital that are now required for large undertakings. There is no doubt that limits may be put upon the amount of the capital stock of a corporation and the value of the property that it may hold. The purposes for which it may be organized may be restricted, and the business it is authorized to carry on may be strictly defined. All this is a matter of regulation, to be determined upon careful consideration of the best interests of the public ; but the method that has been adopted by the legislatures and the courts of many States is to declare the corporation itself an unlawful thing, because the pur-

pose of its creation was to unite a number of rival enterprises into one and so avoid competition and create a monopoly. Agreements thus to unite have been held to be unlawful as in restraint of trade, and so the corporation itself is declared to be formed for an unlawful purpose and subject to be dissolved. The answer of the Court of Errors of New Jersey is that this consequence does not follow, and that even though such agreements be opposed to public policy, corporations duly organized under laws conferring general powers cannot be declared to be unlawful.

There is still another reason, and that is this: While it is well settled that certain kinds of contracts in general restraint of trade are void and not to be enforced, it is not true that such contracts are unlawful. There have been some expressions of opinion to that effect, but I think I may safely say that it was not until the doctrine came to be applied to the "trusts" that it was held in any well-considered opinion that contracts in general restraint of trade were criminal or even illegal.<sup>1</sup> If this be so, then even though the agreement to form a combination of capital may be against public policy and void, yet the corporation when formed is not the result of an agreement that was unlawful at common law.

It is open to serious question whether there is any foundation in the common law for the assertion so frequently made that these agreements for the combination of capital for the control of large fields of industry are illegal or even unenforceable.

There are two propositions assumed to be rules of law in condemning them. One is that monopolies are contrary to the common law, and the other that contracts in general restraint of trade are illegal. It has been held that the combinations are monopolies, and that in so far as they stifle competition on a large scale they are in restraint of trade, and the conclusion is that they are unlawful.

It may be that they are, under certain conditions, contrary to public policy; but the question ought to be dealt with as the question in issue, and not regarded as concluded by rules of law which were worked out under wholly different circumstances, and which the event may show are not applicable to the present conditions.

The first of these propositions is based on "The Case of Monopolies" in the reign of Queen Elizabeth,<sup>2</sup> and on the declaration of

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<sup>1</sup> See *McGregor v. Mogul Steamship Co.*, 22 Q. B. Div. 598; App. Cas. [1892] 25.

<sup>2</sup> *Darcy v. Allein*, 11 Co. Rep. 84.



Lord Coke in the Third Institute,<sup>1</sup> that monopolies are against the ancient and fundamental laws of the realm ; but the case related to the royal grant of an exclusive privilege of making playing-cards, and Lord Coke defined a monopoly as an institution or allowance by the King. He was commenting on the statute against monopolies, 21 Jac. I. c. 3, and declared that a patent for an invention was not good when it appeared that thereby bonnets and caps might be thickened by a fulling mill by which more might be thickened and fulled in one day than by the labors of fourscore men, who got their money by it. The resolution in *Darcy v. Allein*, and the declaration of Lord Coke, and all the statements in the early cases on monopoly, relate to the power of the King to grant special rights against the common right of the subject to labor and to trade.

It was not until a few years past that the doctrine of monopolies was applied, and then in this country, to what was called a practical monopoly, a condition arising, not out of any exclusive right, but merely out of the voluntary acts of individuals or corporations in obtaining control of the supply or manufacture of a commodity. The application of the rule to this condition may be a wise one, but it ought to be frankly acknowledged that the rule of law is a new one, and is not based on the opposition of the English people to royal grants of exclusive privileges ; and in making the application of the rule it should be carefully considered whether the combination can really obtain exclusive powers, or whether the fact that there is no legal prohibition against others does not in effect deter the combination from exacting undue tribute. This doctrine thus guarded and directed against monopolies of a dangerous character and large in extent, will enable the courts to protect the public against injurious acts on the part of combinations that are shown to be in fact against the interest of the community, but it does not justify them, in the absence of specific statutes, in declaring the existence of a very large corporation to be unlawful.

The other proposition is that combinations to reduce competition are in restraint of trade, and that contracts in general restraint are unlawful. The latter clause of this proposition was announced in early English cases which had no relation to combinations for the purpose of preventing competition. The leading case of *Mitchell v. Reynolds*, in which this rule was laid down in 1711, was a suit upon a bond given by a baker's apprentice not to exercise his trade

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<sup>1</sup> 3 Inst. 184.

within the parish of St. Andrew's, Holborn, for the period of five years; and it was held that the restraint being reasonable, and the contract made upon good consideration, an action on the bond might be maintained. Chief Justice Parker referred to the "abuse that voluntary restraints are liable to, as, for instance, from corporations who are perpetually laboring for exclusive advantage in trade;" but the contract regarded as illegal was that of one man not to exercise his trade, and the reason of disapproving of it was that he would be deprived of the means of livelihood and the public to his services. There is a long succession of cases in England on contracts in restraint of trade, and nearly every one of them relates to contracts like that in *Mitchel v. Reynolds*, in which a man in leaving an employment or selling his business agreed not to carry on the same business within a certain area or for a given time, and the only question has been whether the restraint imposed upon this man with respect to the exercise of his own calling is greater than is reasonably necessary for the protection of the other party. The rule was laid down that contracts in general restraint of trade are illegal, but the reason given was that to restrain a man from carrying on his business in any part of England could not benefit the other party, and that it was injurious to the public, and in the latest cases where this reason has failed the rule itself has been regarded as inoperative.<sup>1</sup>

There are a few cases in England in which it has been held that manufacturers, for example, may not bind themselves to close their works at the dictation of the majority for the purpose of meeting a strike of the workmen;<sup>2</sup> but a similar combination on the part of the workmen, though formerly condemned as in restraint of trade, has long since been held to be legal both in this country and in England; and the House of Lords,<sup>3</sup> while admitting that a contract for such a purpose may not be enforceable, has decided that a combination of steamship companies to crush out competition by putting down prices and refusing to deal with their rivals was not an actionable wrong.

The doctrine of restraint of trade if applied to the combinations of capital must be taken with its limitation that the restraint to be illegal must be so general as to be unreasonable in view of the purposes for which it is imposed. It is applicable only to con-

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<sup>1</sup> *Nordenfelt v. Maxim Nordenfelt Guns, etc. Co.*, App. Cas. [1894] 538.

<sup>2</sup> *Hilton v. Eckersley*, 6 El. & Bl. 47.

<sup>3</sup> *Mogul Steamship Co. v. McGregor*, App. Cas. 1892, 35.



tracts and not to the ownership of property. While it makes such contracts void and unenforceable, it does not make them unlawful, and the formation of a corporation to carry out the void contract cannot therefore be treated as unlawful.

The mere fact that a contract is intended for the purpose of avoiding competition does not make it illegal. Every contract by which a man sells his business to another and agrees not to carry it on himself is intended for the very purpose of avoiding competition, and it is not because they stifle competition that contracts are considered as being in restraint of trade, but because they deprive the community of the benefit of the labor of one of the parties.

To prevent competition may incidentally work a restraint of trade, but it is of the essence of freedom of trade that men shall not be compelled to carry on business unless they wish to do so. They cannot be compelled to compete against their will. In a recent case in New Jersey brought to restrain a mining company from purchasing the mines of rival companies and consolidating their interests in settlement of a long litigation, Vice-Chancellor Pitney said: <sup>1</sup>—

“Now I am unable to find any foundation either in law or in morals, for the notion that the public have any right to have the private owners of this sort of property continue to do business in competition with each other. No doubt the public has a reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact the essential quality of that series of acts or course of conduct which we call competition is that it shall be the result of free choice of the individual and not of any legal or moral obligation or duty.” This decision was affirmed by the Court of Errors for the reasons given by the Vice-Chancellor.<sup>2</sup>

It is important for us in this country to observe that the English courts have not applied the doctrines of monopoly and

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<sup>1</sup> *Meredith v. New Jersey Zinc & Iron Co.*, 55 N. J. Eq. 211.

<sup>2</sup> 57 N. J. Eq. 454.

restraint of trade to large industrial combinations, whether in the form of agreements or corporations. Vice-Chancellor Kindersley in 1867 denounced an agreement among railroad companies for the control of coal fields as a dangerous monopoly, but the decision was put on the ground that it was beyond the powers of the railway companies to lease and operate coal mines;<sup>1</sup> and this was followed by the Chancellor in New Jersey in a similar case relating to railways and coal mines.<sup>2</sup>

In the case of Mogul Steamship Company it was admitted that a combination among ship owners to crush out competition by lowering prices and discriminating against shippers who dealt with rival companies might be unenforceable if in general restraint of trade, but it was held that it was not illegal and was not a criminal offence, nor an actionable wrong, and the judges in the House of Lords maintained in the strongest language the right of combination for the purpose acquiring property and controlling business. As a matter of fact, the combination of business concerns in large corporations has been unchallenged in England and has reached enormous proportions.<sup>3</sup> The English opinion was expressed the other day by the London *Economist* when it said: "It is absurd to keep going a hundred inefficient competing agencies to do badly what one efficient consolidated agency can do well."

It is certain that the tendency in the United States toward combination and consolidation has not been seriously checked either by public opinion or by adverse legislation and judicial decision. The repeated assertion that such tendency is contrary to public policy has had scarcely any effect upon the actual results, although it may have changed the means by which they have been reached. If the result is really bad, some way will be found to prevent it, no matter what devices may be chosen to accomplish it; but the fact that the tendency has gone on so many years, and that the results are attained under the ordinary power of corporations to purchase and hold property, may well cause us to ask whether, after all, this movement in the direction of combination of interests and the prevention of undue competition is in fact wholly evil and in every aspect against the best interest of society,

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<sup>1</sup> Attorney-General v. Great Northern Ry. Co., Drew. & Sim. 184; 6 Jur. N. S. 1096.

<sup>2</sup> Stockton v. Central R. R. Co., 50 N. J. Eq. 52.

<sup>3</sup> McGregor v. Mogul Steamship Co., 23 Q. B. Div. 598; App. Cas. [1892] 25.



and whether the danger may best be met by trying to stop the movement, or by putting it under reasonable control.

The question is too large a one for discussion at this time. A great deal has been said and much remains to be said, on both sides, but I may at least suggest that the question is not concluded by the authority of the judicial decisions that have declared that these combinations are against public policy. "Judges," said Mr. Justice Cave,<sup>1</sup> "are more to be trusted as interpreters of the law than as expounders of what is called public policy;" and, as Lord Bramwell declared in a case which he said was an illustration of the wisdom of this remark, "No evidence is given in these public policy cases. The tribunal is to say, as a matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?" The concurrence of judicial opinion is, of course, a strong indication of the public opinion, which, in a sense, is the policy of the people; but the question whether a contract or a great social movement is really against public interest is a question of fact, and a true conclusion depends, not so much upon the study of judicial precedents, or the application of oft-repeated maxims, such as "competition is the life of trade," or "contracts in general restraint of trade are illegal," as upon a close examination of social conditions and the study of the actual economic results. The judge must take a long view, both backward and forward, and he must watch the progress of economic science and be careful not to mistake for maxims of law the current phrases of a past age, and not to lay down as rules of law of the present day the declarations of economists whose theories have long since been abandoned.

The conditions of trade and manufacture are very different from what they have been. The extent of the territory that can be profitably occupied has become much greater, and larger undertakings can now be more easily controlled under a single management.

The great combinations of capital are new, and there has not yet been time to ascertain by experience what is the actual effect of uniting many enterprises for the purposes of reducing the cost of production and regulating the prices of commodities.

The obvious effect is to reduce competition, and it is competi-

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<sup>1</sup> *In re Mirams*, 1 Q. B. [1891] 595.

tion that has been the ruling force in the struggle for existence in the commercial and industrial world. It was supposed to be competition alone that prevented men from asking more for their products than they were worth, and this being removed, there seems to be nothing to restrain the rapacity of those that control any industry; but the natural progress of production is from competition to combination, and from combination to co-operation. We have reached the second stage, but have not yet had experience of the effects of combination on a large scale. Nor do we know whether with the removal of competition there may not come the saving of ill-directed energy, the regulation of supply in accordance with the demand both in place and in time, a saving in the cost of production and a steadiness and a certainty of industrial effort and result and the command of all the capital needed for any useful enterprise, and that out of all these there will not come an increase of actual wealth, a wider distribution of it among the people as stockholders in the great corporations, and a decrease of the cost of commodities to the individual man.

There are grave dangers in the new conditions, and it is well that the courts are alert to guard against them, and are zealous to defend the people against the rapacity of the rich and powerful; but in most matters of business it is safer to let the people take care of themselves than for the courts to interfere with liberty of contract and the natural course of trade. If combinations of capital become too large to be managed with safety and profit they will fail. If they serve a useful purpose and are in accordance with the laws of social development they will go on, and the courts will be powerless to stop them. It is the right and duty of the courts to refuse to sanction contracts that are plainly opposed to public policy, but is a power not to be exercised without strong reason and only after the most careful consideration of the facts which go to prove what the best public policy really is. It is not enough to follow the public opinion of the day, nor even to accept judicial opinion of a former time. The question must be examined anew from time to time as conditions change, and in view of latest experience and the best opinion of experts in social science and of practical men of affairs.

*Edward Q. Keasbey.*

NEWARK, N. J.



## THE SUFFRAGE CLAUSE IN THE NEW CONSTITUTION OF LOUISIANA.

THE long continued domination of one political party in Louisiana led there, as it has elsewhere, to abuse of power and fraud. The faction in power resorted to whatever means became necessary to keep the negroes from exercising the political power that was theirs, had they been well organized. Fraud upon the negroes naturally led to fraud upon members of any opposing faction, even if nominally of the same party. New political combinations resulted, of populists, protectionists, and opponents of election frauds. It is said that they were actually in the majority, but the so called Democrats being in possession of the machinery of political power, managed to retain it. This led to a cry for a Constitutional Convention to form a new Constitution by which the political power of the negroes could be fettered. The problem was to get a new Constitution that would eliminate much more than half the vote of the citizens, and yet that would not be defeated if submitted to the voters of the State, including those who would be disfranchised under it. On the other hand, if a call were issued for a Convention with full powers to frame a new Constitution, the party in power without the approval of a majority of the voters, would certainly oppose the calling of a convention, as one of its first acts would be the abolition of the existing administration. The difficulty was skilfully solved by drawing up and passing an act to be submitted to the voters, calling for a Convention, but with limited powers, and providing also that the new Constitution should go into effect without the approval of the electors. The electors of the State voted in favor of holding a Convention under the terms of this act, and elected delegates to that Convention. This act, thus adopted by the popular vote, and approved July 7, 1896, is a curiosity among the acts calling constitutional conventions. It provided that there should be submitted to the electors of the State, on the second Tuesday of January, 1898, for their approval or rejection, a proposition to hold a Convention to frame a new Constitution for the State upon the following terms and conditions: —

"1. The Convention to meet in New Orleans on the second Tuesday of February, 1898.

"2. To consist of 134 delegates, 98 from parishes and representative districts as now provided for representation in the House and 36 from the State at large.

"3. With power to frame and adopt, without submission to the people, a new Constitution for the State, provided the Convention shall be and is prohibited from enacting, ordaining, or framing any article or ordinance :

"a. Impairing the bonded indebtedness of the State or of any subdivision thereof, or affecting, impairing, etc. the interest thereon, etc., without the consent of the holders thereof ;

"b. Increasing the rate of taxation as now limited by the Constitution, other than for the purpose of aid by parishes, etc. to public schools and public improvements, upon the approval of the property taxpayers affected by such increase ;

"c. Altering, etc. the existing levee system ;

"d. Reducing, etc. the term of office of the present General Assembly, etc., prior to the first Tuesday after the third Monday in April, 1900 ;

"e. Making elective, or shortening or diminishing the salaries of the Justices of the Supreme Court ;

"f. Changing the existing prohibition of lotteries ;

"g. Removing the Capitol from Baton Rouge."

Sec. 2 provided for holding an election under existing laws and by existing electors for a Constitutional Convention upon these conditions, at which the electors shall vote for or against such a Convention.

Sec. 3 provided for the election of delegates to such a Convention, to meet only if the vote for a Convention prevailed.

Sec. 4 provided that the Convention should meet in New Orleans on the second Tuesday of February, 1898, at a place to be designated by the Governor, the Chief Justice to preside temporarily and to administer the oath of office, the Secretary of State also attending and calling the roll. Each delegate must swear that he will well and faithfully perform all duties as a member of this Convention, observe and obey the limitations of authority contained in the act under which the Convention is assembled, no delegate being qualified until he shall have taken this oath. A permanent organization shall then be effected.

Sec. 5 provided a per diem payment to members of five dollars and necessary travelling expenses not to exceed \$50 in any one case, but for 70 days only.



Sec. 6 appropriated \$80,000 for the expenses of the Convention.

Sec. 7 directed the Governor to make proclamation and give notice of such election at least 30 days before its date.

The act was a very shrewd device to tie the hands of the members of the Convention, and yet to put into effect the result of their deliberations without submission to the electors. This was done by the electors themselves, who, while voting to call this Convention, also voted not to pass by their votes upon the new Constitution, but to put it in force without popular ratification. It would seem that great indeed must have been the necessity for a new Constitution when, coupled with an affirmative vote for calling a Constitutional Convention, was the renunciation by the electors of their right to pass upon the results of the labor of the Convention. This may be shrewd politics, but it is poor statesmanship thus to compel the electors to renounce their rights or else go without a much needed new Constitution.

It is strange that the practice of putting a new Constitution into force by the act of its framers without submitting it to the vote of the electors should be found to exist principally in that part of the country that is Democratic. Certainly it is a gross violation of the cardinal principles of the Democratic party, and has no sanction among our best authorities on constitutional law.

The act above recited having received the electoral approval, the members of the Convention began to gather in New Orleans early in February, 1898. Of the 134 delegates only 21 were of French descent. Lieut. Governor Snyder presided at a conference of 35 or 40 delegates, and said he was in favor of the proposition that every white man shall vote, because he is white, and no black man shall vote, because he is black. We cannot put in these words, he said, but we can attain that result. An "understanding clause" like that in the Constitution of Mississippi is elastic, and can be used effectively to prevent negroes from registering. He would have this continue until the year 1900. Then let every man who is registered vote as long as he lives, and let every one failing to register be forever afterwards debarred. After 1900, he would favor an educational or property qualification for those coming into the State or reaching majority. He thought we must give the illiterate white people a chance to register, and this can only be done through an elastic clause. Other plans suggested aim at disfranchising seventy-five per cent of the negroes. Why not

disfranchise them all while about it. We must completely eliminate the negro as a factor.

Another delegate, the Hon. G. W. Bolton, said that the Convention is confessedly called upon to settle the question whether the blacks shall vote. Another gentleman, Charles A. Price, wanted to start right in with the suffrage question and do nothing else until that was finally disposed of.

An editorial in the *Daily Picayune* of February 8 stated that the most glaring deficiency in the old constitution, to be remedied now, is the question of the elective franchise.

The Convention was formally called to order, February 8, 1898, by Chief Justice Nicholls in Tulane Hall, every member but one being present. After a call of the roll by the Secretary of State, the peculiar oath provided in the act above described was administered by the Chief Justice to batches of ten delegates at a time. It is worthy of note that the same gentleman presided at the opening of the Convention of 1879. The Hon. Ernest B. Kruttschnitt was elected President of the Convention by unanimous vote. In assuming the chair he said, "We have here no political antagonism and I am called upon to preside over what is little more than a family meeting of the Democratic party of the State of Louisiana." He spoke of the convention as "an assembly composed of 134 of the leading Democrats of the State." As to the suffrage question, he said: "We are all aware that this Convention has been called by the people of the State of Louisiana principally to deal with one question, and we know that but for the existence of that one question this assemblage would not be sitting here to-day. We know that this Convention has been called together by the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics. . . . That question, my fellow citizens, is one that reaches beyond State lines to-day. I believe that our Northern fellow citizens begin to feel the race sympathy stirring within their breasts. They know that the question that we are trying to solve here is one which imperils not only the integrity of the future government of the State of Louisiana and those of eight or ten other Southern States, but that we, sitting here as a deliberative assembly, and the assemblies of the other Southern States are to decide whether the presidential office is to be set up for barter and sale on account of the irresponsible character of the constituency in these Southern States, and of the venality and corruption of the dele-



gations which they send to certain national conventions. Only a few years back it might have been considered impolitic to say what I am now saying, but there are men standing high to-day in the councils of the nation, who have seen the doors of the White House blocked by the ignorant and corrupt delegations of Southern negroes, and we know that they cannot but feel a sympathy with us in our aspirations and efforts."

Yes, the sympathy of patriots not only in the Northern States but also throughout the whole Union, has been aroused in contemplating the unexpected and bad results that have followed from conferring the suffrage upon the mass of ignorant blacks throughout the South. Let us freely admit that a great mistake was made in thus conferring the suffrage upon them, but let us not lend ourselves to another and perhaps a still more serious mistake by correcting this error by some ultra constitutional method. We may rest assured that in the long run the cause of constitutional liberty is best maintained by correcting errors only by the methods pointed out in the Constitution.

The president also spoke of the importance of education and of the Judiciary, although he spoke of them as of minor importance as compared with the suffrage question, which was the first to come before them and to settle which the Convention was really called. In this paper it is proposed to treat principally of this subject, as the space allowed us is too brief to give thorough examination of the other subjects passed upon.

A committee of nineteen members to consider what committees should be appointed was the first business of the session, and they reported the next morning, recommending the appointment of a Committee of twenty-five members on Suffrage and Elections, another on the Judiciary, and they further recommended a resolution that was adopted, providing that no ordinance, etc., shall be considered until the report of the Committee on suffrage and Elections shall have been made to and finally acted upon by the Convention; all other business to be referred at once to appropriate committees.

The next day, February 10, five plans for suffrage were introduced and referred to the Suffrage Committee when appointed. February 11, three more suffrage plans were introduced and referred.

Rules for the Convention were submitted and adopted, and it was voted to appoint certain named Standing Committees.

February 14, by invitation, the Committee was addressed by Dr. J. L. Curry representing the Peabody Educational Fund. He told the Convention that "a Constitutional Convention is the embodiment of popular sovereignty. Except under the mutations of the moral law and the prohibitions of the Federal Constitution, and possibly some restrictions embodied in the law summoning this body, this body is sovereign and its civil power is unlimited. Its decisions are ultimate. For expediency sake, but not of right, they may be conditioned on popular approval, but such an appeal is not essential to validity."

We cannot help expressing surprise and regret that such erroneous views should be given sanction by a man of so high a position, and can only excuse them upon the supposition that the learned doctor spoke without adequate preparation upon a subject not within the sphere of his professional acquirements. Had he studied Jameson, Von Holst, and other writers on constitutional law he would have found that the views he presented are not in accord with those presented by admitted authorities. A Constitutional Convention no more embodies the sovereignty of the people than the Legislature does. Both are but the agents of the sovereign power. Not even the vote of the electors to accept the result of a Constitutional Convention as the supreme law of the State without ratification by the electors constitutes a Convention the sovereign power. Such a fundamental error should not be allowed to pass unnoticed. Doubtless it would be a very welcome doctrine to our political bosses like Croker, Platt, and Quay, for under its cover they could work still further the enslavement of our people, and their deprivation of political power. The price of liberty is eternal vigilance, and error like this should not pass uncorrected.

Both legislatures and constitutional conventions are representative bodies. They act for the electors because it is impossible for all the electors to meet and act. But the sovereign is the person or body of persons in a State over whom there is politically no superior.<sup>1</sup> "Sovereignty is and remains in the people." It is inalienable, that is, "society can never delegate or pledge away sovereignty. . . . Being inherent and necessarily in the State, it cannot pass from it so long as the latter exists."<sup>2</sup>

In the rest of his address Dr. Curry most forcibly and with great

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<sup>1</sup> Jameson on Constitutional Conventions, sec. 18; *Penhallow v. Doane's Adm'rs.*, 3 Dallas, 54.

<sup>2</sup> Lieber, *Political Ethics*, pp. 250, 251.



ability set forth the advantages of education, the necessity of an efficient common school education, the injustice and bad results that would follow if the common school education to be given to the negroes were limited, as had been proposed, to the share of the tax paid by them.

At the session held February 15, many ordinances or propositions as to clauses in the new Constitution were introduced and referred to the appropriate committees. Among them were five relating to the suffrage. The Suffrage Committee, the most important committee of the Convention, met and discussed some of the plans proposed. The suggestion of registering officers with dictatorial power was deprecated, and it was admitted that illiteracy was so great in Louisiana that an educational qualification would exclude too many whites, besides excluding the blacks. An editorial in the *Picayune* frankly stated, "The difficulty is to let in the illiterate whites, while shutting out the ignorant negroes." One plan suggested was to make voters of all persons entitled to vote on January 1, 1865. The object is obvious. At that date, although the Thirteenth Amendment to the Constitution of the United States had passed (abolishing slavery), the Fourteenth Amendment (in effect making negroes citizens) had not passed. Therefore in January, 1865, the negroes in Louisiana could not vote, and to give the suffrage to those who had it in 1865 would exclude the negroes. The suggestion becomes important in view of the plan afterwards adopted.

February 17, the Suffrage Committee met and heard arguments on various suffrage plans before them. The burden of these speeches was how the problem should be solved of preventing the negroes from voting and yet of keeping within the provisions of the Constitution of the United States. The subject was still further considered on February 18, by the Suffrage Committee in executive session. The next day United States Senator McEnery, formerly Governor of the State, addressed the Suffrage Committee. He maintained it is against all natural laws to allow the blacks to vote. The Suffrage Committee continued its work the next week. Among other plans it was proposed to use the registration of electors that was taken in 1897 as a basis for the right to suffrage. This plan might have been adopted if warning had been given in time before that registration to make an effort to secure registration of all the whites. A sounder objection to this plan was pointed out. It would involve investing too great confi-

dence in the registrars. One would think that danger from this source could be avoided by giving a right to appeal from the registrars' decision. But it was felt that this would impair the efficacy of the system in preventing negroes from attempting to register.

In order to give time to secure full registration of the whites, it was proposed to extend the time to January 1, 1899.

The suggestion was made that all persons be admitted to the suffrage who were voters January 1, 1868. This was before the adoption of the Fourteenth and Fifteenth Amendments to the Constitution. If adopted, this plan would obviate the necessity of an "understanding" clause, like that in the new Constitution of Mississippi (under which the registrars can exclude from the list of electors any one who, being unable to comply with the educational qualification of reading and writing, cannot *understand* a clause in the Constitution of the United States when read to him). It would admit to the suffrage all the veterans of the civil war whether northern or southern.

It only remained to give the right to vote to this class and to their male heirs, and the negroes would be forever excluded from the right to vote! But for some reason not disclosed the Suffrage Committee came to the conclusion that it would be unconstitutional to adopt this course.

On the 1st of March the subcommittee of six on a plan for suffrage reported\* to the committee the plan that was adopted afterwards, with some additions and verbal changes, substantially as the suffrage scheme of the Constitution. Briefly it is this.

Art. I. (Art. 197 of the Constitution). Every male citizen of the State and of the United States, native born or naturalized, not less than twenty-one years of age and possessing the following qualifications, shall be an elector and entitled to vote at every election in the State, except as hereinafter otherwise provided.

Sec. 1. He shall have been an actual *bona fide* resident of the State at least two years, with provision as to length of residence in the parish ward or precinct, and for removal from one precinct to another without loss of vote.

Sec. 2. Registration shall precede voting. The present voting and registration laws shall remain in force until December 31, 1898, and then the provisions herein contained as to suffrage and registration shall go into effect.

Sec. 3. He (the voter) shall be able to read and write as demonstrated by his personal application in writing for registration, under oath, (with



provision in case of physical disability) in accordance with the form stated.

Sec. 4. If unable to read and write he may register and vote, if a *bona fide* owner of property assessed at not less than three hundred dollars, on which all taxes due shall have been paid.

Sec. 5 contains the meat of the suffrage plan. No male person entitled to vote January 1, 1867, in any State wherein he then resided, and no son or grandson of such person not less than twenty-one years old at the date of the adoption of this Constitution, and no male person of foreign birth naturalized prior to January 1, 1898, shall be denied the right to register and vote by reason of his failure to possess the educational or property qualification herein prescribed. To this was subsequently added, provided he shall have resided in this State five years next preceding the date at which he shall apply for registration and shall have registered in accordance with the terms of this article prior to September 1, 1898, and no person shall be entitled to such registration thereafter. (Then follows provision for application for such registration and the oath to be taken, etc., with power to the Legislature to provide for future registration and purging the list kept hereunder.)

After a vigorous contest, Art. 198 was afterwards added, providing for a poll tax of one dollar per annum to be used exclusively in aid of public schools, to be paid before voting, unless the voter be over sixty years old.

Art. 199 was afterwards added, providing that upon all questions submitted to the taxpayers of any municipal or other political subdivision of the State, women taxpayers shall also have the right to vote without registration, in person or by their agents authorized in writing.

Art. 201 provides a remedy to those denied registration, by appeal, etc.

Art. 202 specifies who shall not be entitled to registration and the suffrage: criminals, inmates of charitable institutions, except the Soldiers' Home, persons confined in public prison and interdicted, and insane and idiotic persons.

Art. 203 provides that all elections by the people shall be by ballot, and the ballots shall be publicly counted. In all elections by persons in a representative capacity, the vote shall be *viva voce*. (Query, why this clause?)

On the 4th of March the committee on suffrage made their report, submitting the plan for suffrage substantially as outlined above. In explanation of Section 5, the crux of the plan, the chairman, General T. F. Bell, said: "The committee desire to say that

all through our work we have found frowning before us a solid stone wall prohibiting us from planting in the Constitution, prohibiting us from denying the right to vote to a certain class. Had that been out of our way, our work would have been easier. . . . We have builded up a structure with the very remote possibility that Section 5 will not stand the test of hostile courts. If it fails, you will still have a fairly good system without it. The probability of this is very remote."

The subject was made the special order of the day for March 8, and was then discussed at length, most of the opposition being based upon the omission of a poll tax clause. This, however, as already explained, was afterwards added. The President, Mr. Kruttschnitt, spoke earnestly in favor of the plan recommended by the Suffrage Committee. He spoke of it as "the greatest question which has been before the people of the State of Louisiana since, in the month of January, 1861, they were called upon to consider the question of the severance of the relations which bound them to the other States of the Union. . . . We all know, we, the white people of the State of Louisiana, that the problem which we desire to solve is to undo the greatest crime of the nineteenth century, the placing of the ballot in the hands of the negro race by the Fifteenth Amendment to the Constitution of the United States." (Applause.) He argued that ignorance, as represented by the black race, must be eliminated and prevented from voting, yet those (white men) who fought for the South, and were ignorant, must be allowed to vote. He discussed the poll tax but did not favor it, because it can be easily used to further political fraud. To guard against this, its payment a year before election was suggested. Several speakers admitted the problem to be the finding of a lawful method to prevent the negroes from voting. Judge Coco spoke of "our efforts to eliminate the negroes from our electorate." He recognized the fact that were it not for the Fourteenth and Fifteenth Amendments to the Constitution of the United States, but a few lines would settle the question. "These would do it: 'No one but white citizens shall exercise the right of suffrage in this State.'" He was opposed to Section 5 because he believed it to be unconstitutional. He argued that, inasmuch as in 1868, only whites could vote, the fifth section might as well read: "No person shall be denied the right to vote who, on January 1, 1868, or any date prior thereto, was a white citizen of the State of Louisiana. . . . No one will deny that this would be unconstitutional. To my mind, the



section presents a weak and transparent subterfuge and unmanly evasion of the Constitution of the United States, and on that ground alone I could not give it my support."

Mr. Soniat argued against the unconstitutionality of Section 5 because it is ambiguous in not stating whether it is under the civil or the military laws of Louisiana prior to 1868 that voters were to be granted the suffrage. He said that in 1867, under the military law then in force, every male negro of twenty-one years or over in the State could vote. Were they to become voters now under this clause?

The debate was continued the next day. Mr. Burke said: "The injunction of the people on the suffrage was twofold: eliminate as many of the negroes as possible, and as few of the whites. . . . The reason for putting in that clause" (Section 5) "was to put the State absolutely in the hands of the white people, as far as can be done without contravening the Constitution. If they adopt this clause, they would take in the bulk of the white people of the State. It was not because he was a hereditary voter as his father's son, but because he was a white man."

Here is a distinct recognition of the grant of the right to vote to the white man because he is a white man. Is it not a denial to the black man on account of race, color, or previous condition of servitude, and therefore in contravention of the Fifteenth Amendment?

Mr. Sanders said: "We are here to write in the organic law of Louisiana that the white man shall always rule this State." (Applause.)

Continuing the debate, March 10, Mr. Breazeale spoke against allowing any man to vote on a property qualification when the property was his wife's or his minor children's.

"Mr. Boatner: 'Will Mr. Breazeale permit me to suggest that the committee was seeking in this, in a general way, the exclusion of all the negroes and the inclusion of the whites?'

"Mr. Breazeale: 'Was this then an act of principle or expediency?'

"Mr. Boatner: 'Well, of expediency.'"

Mr. Breazeale opposed the registration plan as a certain instrument of fraud. After another day's vigorous debate, so many spoke in favor of a poll tax clause that the measure was recommended to the Suffrage Committee.

Judge Coco wrote to the Picayune: "The very reason of this

Convention is, in morals, dishonest, for its purposes are to do in an indirect way what we cannot do directly. The Fifteenth Amendment, to protect the negro and for that purpose alone, provides that the right of suffrage shall not be denied or abridged on account of race, color, or previous condition of servitude. We propose to deny him that right on account of his race, color, or previous condition of servitude. This unconstitutional measure we propose to enact through constitutional and honest means. Well, I say it cannot be done through constitutional and honest means. Whilst we might and must surround the right, after conferred, with proper safeguards, such as will secure an honest and fair expression of the suffragans' will at the polls, we must limit the right to white men, and this we are of necessity compelled to do through dishonest means."

Judge Semmes, continuing the debate, March 16, declared Section 5, in his opinion, not to conflict with the Fifteenth Amendment, because in 1867 "there were five or six States in which persons of color were entitled to vote."

But this ignores the fact that it would exclude from the suffrage all the negroes of Louisiana, — unless they should be found to be voters under the provisions of the military laws in force at that time, in which case the whole object of Section 5 would be defeated. Judge Semmes contended that the clause in question is not in conflict with the Fifteenth Amendment, because it is not based on race, color, etc., but upon a previous right to vote. But was not this previous right to vote based upon race, color, etc.? He called attention to the fact that, even should Section 5 be declared unconstitutional, there still remains a good constitutional working scheme, the difference being that no one could vote under Section 5. He said, "We proclaimed, at least in my part of the State, that we were coming to establish the ascendancy of the white race, and to see to it that no white man should be disfranchised."

Mr. Bailey, the only Populist in the Convention, while avowing himself a believer in the supremacy of the white race, doubted the constitutionality of Section 5. He thought its provisions were too broad and provocative of fraud, as too much power is given to the registrars.

March 18 consternation prevailed among the members of the Convention upon receipt of opinions from the United States Senators from Louisiana, Caffery and McEnery, that Section 5 is unconstitutional. A caucus was held at which the subject was



discussed. It was said that a telegram from Senator McEnery stated that Section 5 was grossly unconstitutional, that he had submitted it to several leading Democrats of the Senate, who conferred with him, and he stated it would have the effect of losing the State representation in Congress and in the electoral vote. Senator Caffrey took the ground it was unconstitutional because it established a privileged class of voters for three generations, without qualifications, while it imposed qualifications on other voters, and also because it discriminated against the colored people.

A good deal of feeling was shown by the speakers, and much surprise at the course taken by the Senators.

Judge Munroe read a written opinion embodying a proposal to admit to the suffrage all men who enlisted in the Confederate army from seceding States and their sons and grandsons, and all men who enlisted in the Federal army from non-seceding States, and their sons and grandsons. He contended this would be constitutional, because many negroes enlisted in the Federal army from seceding States, while many men enlisted in the Confederate army from non-seceding States.

Mr. Strongfellow said he was in favor of an "understanding clause." He thought that under it they could make one grand sweep, include all the white people, and then put the bars up as they wanted to, and thus settle the suffrage question for all time to come.

In consequence of the objections of the two Senators to Section 5, on March 22 an "understanding clause" was proposed, providing that every applicant for registration as a voter unable to read shall be examined by a registrar of voters or his deputy, and if in the opinion of such examiner, the applicant can understand the Constitution of the State, he shall be admitted to registration and to vote at all subsequent elections. This would place enormous power in the hands of the registrars, officers not of high rank nor probably of intellect. Perhaps owing to this, and also because of other reasons not disclosed, the next day the "understanding clause" was abandoned, and the Convention reverted to Section 5 somewhat modified, and adopted it on the 24th of March, adding the poll tax provision to take effect after 1900.

The Convention continued in session until May 13 but we limit ourselves in this article to the suffrage plans suggested and adopted, hence we pass over the consideration of other interesting work of

the Convention. The Constitution as finally adopted by the Convention is about one third longer than the Constitution it superseded. This greater length is due to the introduction of many petty details of legislation that should have been left to the Legislature to adopt in the form of statutes. This is a fault common to all the conventions of later years. Instead of confining themselves to a Bill of Rights, the enumeration of the powers of the three departments of the government, and, in general, the statement of broad principles, they all err in introducing details of legislation that should not be put into a Constitution, because, being more or less ephemeral, a change will soon be needed, and to bring about a change, either the Constitution must be amended, or the obnoxious detail must be got around. This leads to loss of respect for the Constitution.

Judge Semmes, the Chairman of the Judiciary Committee, the leader of the bar in the State, in seconding the motion to approve and sign the final draft of the Constitution, said, "We met here to establish the supremacy of the white race."

Mr. Kruttschnitt, the President of the Convention, spoke after Judge Semmes, closing the Convention, and said: "We have not drafted the exact Constitution we should have liked to have drafted; otherwise we should have inscribed in it, if I know the popular sentiment of this State, universal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins. We could not do that on account of the Fifteenth Amendment to the Constitution of the United States. . . . What care I whether the test we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Does n't it meet the case? Does n't it let the white man vote, and does n't it stop the negro from voting, and is n't that what we came here for?" (Applause.)

By far the most important matter passed upon was the question of the suffrage, the admitted purpose being the adoption of a plan that would keep out the negroes and admit the whites and yet that would not be open to the charge of violating the Fifteenth Amendment, as is proved by the above cited extracts from the records of the Convention and the stenographic reports of the speeches made. In construing the meaning of the different parts of the Constitution of the United States, we have recourse to the imperfect records of the proceedings of the Convention that drafted that instrument. We turn to its Journal, to Elliott's Debates, and to the Federalist.



Our reports teem with extracts therefrom. When the question of the constitutionality of Section 5, Art. 197, of this Constitution comes before the Supreme Court of the United States, the meaning of this clause, its true intent, is, in the same way, open to explanation through examination of the language used by the makers of this Constitution.

This course does not seem to have been followed in the presentation of the case of *Williams v. State of Mississippi*, decided April 25, 1898.<sup>1</sup> However mistaken the adoption of the Fifteenth Amendment and however desirable it may be to exclude the vote of the ignorant Southern negroes, can we doubt that, when the question is carried to the Supreme Court of the United States, Section 5 of Art. 197 of this Constitution of Louisiana will be declared unconstitutional, if the court look at the true intent, real meaning, and actual operation thereof, by taking into consideration these declarations and explanations by the men who made it?

The only method to eliminate the negro vote of the South known to the jurist, and to all who believe in the enforcement of law, so long as it remains law, is to secure the repeal of the Fifteenth Amendment.

The manner in which the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States were carried through may be reprehensible, and the wisdom of the last two Amendments may admit of question. Nevertheless they are the law of the land, and, until altered in accordance with provisions of the Constitution, they must be obeyed.

*Amasa M. Eaton.*

PROVIDENCE, R. I.

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<sup>1</sup> 170 U. S. 213.

# HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER

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THE LAW SCHOOL. — The following table shows the registration in the school on November fifteenth for eleven successive years: —

	1889-90	1890-91	1891-92	1892-93	1893-94	1894-95
Res. Grad. . . .	—	—	—	—	—	—
Third year . . .	50	44	48	69	66	82
Second year . . .	59	73	112	119	122	135
First year . . .	86	101	142	135	140	172
Specials . . . .	59	61	61	71	23	13
Total . . . .	254	279	363	394	351	402

  

	1895-96	1896-97	1897-98	1898-99	1899-1900
Res. Grad. . . .	—	—	1	1	—
Third year . . .	96	93	130	102	134
Second year . . .	138	179	157	169	193
First year . . .	224	169	216	218	232
Specials . . . .	9	31	41	58	51
Total . . . .	467	472	545	548	610

The increase in the total registration is very marked. The first year class is larger than in any previous year, and the same is true of the second and the third year classes. Of the third year class, 21 per cent did not return, as against 32, 28, 36, 30, 34 and 44 per cent respectively, in six preceding years. The second year men failing to return make only 12 per cent of the whole class, as against 25, 7, 23, 28, 24 and 27 per cent in former years.

The number of men who did not take their examinations last year was 10 per cent in the first year class, and 7 per cent in the second year class, as compared with 16 and 6 per cent, and 9 and 3 per cent respectively, for the two previous years.



The following are the usual tables showing the sources from which ten successive classes have been drawn, both as to previous college training and as to the geographical districts from which they have come : —

Class of	HARVARD GRADUATES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89

Class of	GRADUATES OF OTHER COLLEGES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	107
1902	22	29	61	112

Class of	HOLDING NO DEGREE.			Total.	Total of Class.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.		
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232

Thirty-one of the men in the first year class, who hold no degree, are Harvard seniors on leave of absence. Next year, however, no persons qualified to enter the Senior Class of Harvard will be admitted to the school as such. In the future, therefore, there will be practically no one in the first year class holding no degree.

The following thirty-eight colleges have conferred their first degrees on members of the entering class, the figures indicating the number of men from each college, when there are more than one: Yale (22), Dartmouth (13), Brown (10), Bowdoin (8), Amherst (4), Johns Hopkins (4), Princeton (4), Williams (4), University of Wisconsin (4), University of Chicago (3), Iowa College (3), Boston College (2), Franklin and Marshall (2), Hobart (2), University of Illinois (2), University of Michigan (2), Oberlin (2), Beloit, Colby, Columbia, Cornell, University of Georgia,

Georgetown, Holy Cross, Indiana University, Lawrence, Leland Stanford, Massachusetts Institute of Technology, University of Missouri, University of Mount Allison, University of New Brunswick, New York University, Pennsylvania College, Tufts, Tulane University of Louisiana, Washington and Jefferson, Wesleyan University, University of Wooster.

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INCRIMINATING QUESTIONS UNDER THE BANKRUPTCY ACT.—The recent case of *In re Rosser*, 96 Fed. Rep. 305 (Dist. Ct., Mo.) has picked a new flaw in the National Bankruptcy Act. *In re Scott*, 1 Am. Bank. Rep. 50 *acc.* An insolvent refused to answer certain questions before a referee on the ground that the answers might tend to incriminate him, relying on the Fifth Amendment to the Constitution. It was held that he might refuse to answer—§ 7 of the Bankruptcy Act, that “no testimony given by him shall be offered in evidence against him in any criminal proceeding,” notwithstanding. In the case of *Counselman v. Hitchcock*, 142 U. S. 547, it was held that one under investigation before a grand jury was protected from incriminating questions in spite of a statute (Revised Statutes, § 860) which provided that no evidence given in a judicial proceeding could “be given in evidence or in any way used against him” in any subsequent proceeding. In a later case, *Brown v. Walker*, 161 U. S. 591, a statute more broadly framed against any use whatever of so-called incriminating evidence in or for later proceedings was held to do away with the possibility of incrimination, and so the application of the constitutional privilege, and a stubborn witness was refused a writ of *habeas corpus*. In spite of these decisions the clause which was inserted in the new Bankruptcy Act is weaker than the proviso which was discussed in *Counselman v. Hitchcock*,—it seems simply a bit of carelessness. The only operation it can have is to induce a bankrupt to make disclosures—it was intended to force him.

In England it has been held, since Lord Eldon in *Re Cossens*, 1 Buck. 531, that the common law privilege against self-incrimination is without application in Bankruptcy proceedings. *Re Smith*, 2 Deac. & Chit. 230; *Ex parte Reynolds*, 20 Ch. D. 294; Lowell, Bankruptcy, § 158. Since bankruptcy proceedings are an exception to the common law privilege against self-incrimination, might not the constitutional privilege be construed to have the same exception—especially in view of the fact that bankruptcy legislation is, in one aspect, favorable to the bankrupt? The English cases that established the exception do not seem, however, to antedate 1820, *Re Cossens*, *supra*, and the argument has never been raised in the United States.

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THE VALIDITY OF FOREIGN CONTRACTS.—The law applied by the courts of England in the enforcement of foreign contracts, ever since the decision of *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589, has remained uncertain. So far as any definite rule is laid down, they determine the validity of the contract by the law of that jurisdiction which the parties intended should govern. Since such intent is rarely expressed, this rule without further elaboration is unserviceable. Therefore, after Lord Justice Bowen, in the case above cited, declared it unwise to lay down specific rules in a matter of such growing commercial importance, each succeeding case has been obliged to seek out its own decisive reason.



A variety of conflicting presumptions have been developed. In consequence, in the case of *South African Breweries v. King*, [1899] 2 Ch. D. 173, the court had to resort to the phrase: "the law of the place with which the contract has most real connection." In this case an injunction was sought against the violation in Natal, South Africa, of a contract made in the South African Republic not to engage in the brewing business in any part of South Africa for five years. The injunction was refused on the ground that the stipulation was void by the law of the Transvaal. Of the propriety of this result there can be little doubt on any view, since performance was due in part, at least, at the place of contracting. Exception may be taken, however, to such indeterminate language.

In this country, if the cases have not been so wilfully vague as in England, they have often been equally indiscriminating. They have failed, it would seem, to analyze the elements of contracts before determining which law to apply to the element in question. In regard to validity, which was the issue in the principal case, many of our courts, notably the Federal courts, have followed the later English cases in applying the law which it is presumed the parties intended to incorporate in the contract. Unlike the English cases, however, they presume this to be the law of the place of performance. *Pritchard v. Norton*, 105 U. S. 124. Most jurisdictions, on the contrary, have determined the legality of contracts by the law of the place where the contract was made. *Aker v. Demond*, 103 Mass. 318; *Staples v. Nott*, 128 N. Y. 403.

This divergence is an example of a failure to analyze and of an undue extension of the test of the intent of the parties, which is useful only in cases of interpretation. Since interpretation seeks only the intent of the parties expressed in an obligation admittedly binding, the law governing interpretation doubtless should be that of the place which the parties may be presumed to have intended should govern. But no such reason exists for applying this test in deciding the validity of a contract. A legal right can be created only by the law. Until it makes binding a personal relation, the intent of the parties can be of no consequence. This reasoning, as carefully developed in 10 *Harvard Law Review*, 168, leads to the true rule for determining which law to apply. The law that imposes the obligation must have jurisdiction of the act which invokes it. Hence the tests of the legality of a contract should be sought — where most of our courts have sought them — in the law of the place where the contract is made.

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**SUBROGATION AND VOLUNTEERS.** — A recent case, *Brown v. Rouse*, 58 Pac. Rep. 267 (Cal., Sup. Ct.), illustrates the length to which a court of equity will go in refusing subrogation to a volunteer. The defendant's husband, acting under a power of attorney which the plaintiff, under a mistake of law, thought authorized a mortgage, gave the plaintiff a mortgage on the defendant's land in return for a loan, with which a prior mortgage on the land was paid off. The court held that as the plaintiff was under no obligation to discharge the prior mortgage, he, as a volunteer, could not be subrogated to the rights of the prior mortgagee. Subrogation, it is said, will be decreed only in favor of a party who is in some way compelled to discharge a demand against a common debtor.

The rule adopted in the principal case is that sanctioned by the weight

of authority, but the courts are by no means uniform in its application, and there are many exceptions to it. Thus subrogation is usually granted to a volunteer, who advances money to a wife living apart from her husband to be expended for necessities, *Harris v. Lee*, 1 P. W. 482; or who pays a protested bill of exchange for the honor of the drawer or other party to it, *Bishop v. O'Connor*, 69 Ill. 431; or who advances money to pay a claim, owing to a mistake of fact, or owing to fraud in the borrower, *Milholland v. Tiffany*, 64 Md. 465. Indeed, it is said by Allen, J., in *Barnes v. Mott*, 64 N. Y. 397, that the doctrine of subrogation has of late been greatly extended, and, modified to meet the circumstances of cases, has been applied to volunteers. The confusion on this subject seems to be due to the fact that the courts have erroneously treated the rule, that equity will not grant subrogation to a meddler, as in some way a deduction from the rule that it will not aid a volunteer. The subject would be much clearer if it were generally recognized that subrogation will be granted when justice demands it. On principle there seems to be no sufficient reason for calling a person, situated as is the plaintiff in the present case, a meddler, and on that account refusing him equitable relief. He was not officious, the prior mortgage was paid off to protect, as he thought, his own interests, and the distinction drawn by the court, that as his payment was due to a mistake of law and not one of fact, there could be no subrogation, appears in a court of equity rather forced.

The court, moreover, fails to notice that the plaintiff might have had a remedy at law. If the defendant repudiated the transaction, the consideration on which the first mortgagee received the money fails, he will still hold his remedy, the mortgage debt, and the plaintiff can recover against him in an action for money had and received. If, on the other hand, the defendant ratifies the transaction, since that ratification is equivalent to a prior authority, it would seem that the plaintiff could recover against the defendant in an action for money paid to the defendant's use. *Crumlish's Adm'r v. Improvement Co.*, 38 W. Va. 390.

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THE LAW GOVERNING TRIBAL INDIANS. — The recent case of *Jones v. Meehan*, Supreme Court of the United States, October Term, 1899, manuscript, brought up an interesting question as to the status of certain Indian tribes in Minnesota. In that case, a bill in equity to quiet title, it became necessary for the plaintiff to show that one Moose Dung the younger was sole owner of the land in question. All his right he had as heir of his father, the old chief Moose Dung of the Red Lake Band of Chippewa Indians; to whom the land was originally given by the United States. The old chief left a number of children by two wives; it was contended that they all inherited the lands of their father. But the court said these Indians were tribal Indians, they lived with their tribe, and the tribal organization was still kept up; so the laws of the tribe must govern the descent of the property. And by the laws of the tribe, as was established, the young Moose Dung, the eldest son of the old chief and his successor as chief of the tribe, took all the property of the father. Those Indian tribes, although the United States deals with them by treaty, are yet of necessity subject to whatever legislation Congress may enact for them, *U. S. v. Kagama*, 118 U. S. 375; but they have no



relations at all with the separate States. Tribal Indians on a reservation are subject to the original tribal law as modified by the special United States statutes, but no State law is of any effect, although the reservation may be within the territorial limits of the State. This has been clear in regard to the laws of marriage, probate, or of personal property; as to these the tribal law has been frequently recognized. The recognition of it in regard to the descent of real property, as in this case, is rare, yet it is obviously entirely sound.

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THE LIMITS OF RIPARIAN LAND. — As to the right of those who own land bordering upon a stream to the use or detention of the water of such stream, there are numerous decisions: that for domestic purposes (which includes the watering of stock as well as the necessities of the household) a riparian proprietor has a natural right to use all the water in the stream; that for business purposes (manufacture or irrigation) he may, in America, consume or detain his fair share of the water, even though this result is damage to a lower proprietor; that water so taken and detained must be for use on riparian land, — yet there is a singular lack of authority as to just what land may be called riparian. In a recent case in California, however, the question was brought squarely before the court. *Batgate v. Irvine*, 58 Pac. Rep. 442 (Cal., Sup. Ct. Com.). The defendant, whose land extended far back from the stream, was in the habit of conveying water from the stream across the watershed for his live-stock. The plaintiff, a lower proprietor who was inconvenienced, recovered judgment, on the ground that riparian rights cannot extend beyond the watershed of the stream. The reason given by the court is that land which contributes by drainage to the waters of a stream is entitled to the benefits derived from the stream, and ought not to be deprived of these benefits by land which in no wise drains into the stream. Hence, land beyond the watershed is not properly riparian. This reasoning seems adequate, although the rule laid down is rather indefinite as regards the actual extent of riparian land, which must vary according to the natural features of the district. When riparian right originated, in early times in England, there was neither such a scarcity of water, nor such an extensive use of it for domestic purposes. In applying it to the changed conditions in this country, therefore, it is well to keep the right strictly within limits. As regards the right to a fair share of the water for business purposes, which is allowed generally in this country, though not in England, the same reasoning applies. The rule in the present case, that riparian rights extend only to the watershed of the stream, being just and easy of application, would therefore seem to be sound law.

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RIGHT OF SUPPORT. — The peculiar facts in the case of *Trinidad Asphalt Co. v. Ambard*, 81 L. T. Rep. 132, raise an open question. The parties were owners of adjoining lots on the island of Trinidad, under a large portion of which is a deposit of asphalt, which lies from four to six feet below the surface. The nature of this substance is such that its consistency varies with the temperature and the pressure to which it is subjected, and, having no angle of repose, it moves continually in the direction of least resistance. The defendant excavated on his lot so

that the asphalt oozed in that direction, and caused the plaintiffs' land to subside. It was admitted that the surface is of little value, for, owing to the constant movement, sinking is more or less frequent. The court held that the plaintiffs were entitled to recover. It took the position that since asphalt is a mineral — not water — the action would clearly lie for the violation of the natural right to support of land by adjoining land. It refused to consider the settled rule that no recovery may be had for the withdrawal of support of underground water, whether it be collected in a body, *Northeastern Ry. Co. v. Elliot*, 1 J. & H. 145, or dispersed through the soil, *Popplewell v. Hodgkinson*, 4 Exch. 248, and evidently regarded those cases as anomalous. What the court would hold if the supporting substance had a density greater than water and less than asphalt does not appear, since they declined to discuss the question of degree. The defendant forcibly contended that the analogy here was more nearly that of water, because as supporting mediums both substances have the common property of instability. This view, broadly stated, looks not at the chemical composition of the stratum, but at its qualities of resistance. And, on principle, it would seem better to apply a test of this nature. 10 HARVARD LAW REVIEW, 183. Perplexing questions of degree are avoided by recognizing a general rule based solely upon the utility of the substance as a medium of support. If, then, the distinction between stable and unstable strata be sound, the mere fact that asphalt is a mineral — not water — is not conclusive. Moreover, in cases near the line local conditions may well be considered, as in *Hendricks v. Spring Valley Mining Co.*, 58 (Cal. 190 Cal., Sup. Ct.), where no action was allowed for removal of lateral support, because the adjoining lots were located chiefly for hydraulic mining purposes. So in the principal cases, since the chief value of the land was the asphalt deposit, the restrictive effect of the decision upon an important local occupation should have been regarded. On the whole, then, the court might well have reached an opposite result.

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ACQUIESCENCE FOR DETECTION. — The owner of goods may give the most complete opportunities to a would-be burglar for the purpose of entrapping him — the act is none the less a burglary. But if he through an agent solicits the person suspected to commit the crime, there can be no criminality — though the felonious intent is present, the entry is not made *invito domino*. *Eggington's Case*, 2 Leach, 913. The only disputed point in this branch of the law is how far the owner can go in laying traps for the offender. In *State v. Abley*, 80 N. W. Rep. 225 (Iowa), a town marshal incited the defendant to commit a burglary, obtained a key of the premises from a clerk without the knowledge of the owner for the defendant to duplicate, and informed the clerk of his plan to entrap. The owner, warned by the town marshal, procured the arrest of the defendant as he was leaving with the stolen goods. The defendant was convicted of burglary. The court sustained the conviction, seeming to base its decision entirely on the fact that the owner remained absolutely passive, and the inference is that otherwise the result would have been different. Though this view has some support from the authorities, *Williams v. State*, 55 Ga. 391, yet the better view, and the one generally adopted is, that so long as the owner did not induce the original intent, but only provided for its discovery after it was formed, the criminality of



the act will not be affected. *Alexander v. State*, 12 Texas, 540 (Tex., Sup. Ct.). The argument that consent to the entry can be implied from the facilities afforded would seem to be clearly rebutted by a consideration of the object for which they were furnished. This is the view of the modern German authorities. Olhausen, Commentary on the German Penal Code, 880. There is no doubt about the correctness of the decision in the principal case. It can scarcely be contended that the town marshal was the agent of the owner, and at any rate the plan was conceived before there was any communication between them. A position which might have been taken by defendant is that the public should not punish, as an offence against itself, an act which was instigated by its own official. *Saunders v. People*, 38 Mich. 218. The short answer to this would seem to be that the official in thus acting cannot be considered the agent of the public, and therefore cannot bind it.

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RIGHTS OF A POLICY HOLDER IN THE SURPLUS OF A LIFE INSURANCE COMPANY. — The decision of the New York Court of Appeals in the case of *Greff v. Equitable Life Assurance Society*, 54 N. E. Rep. 712, is a notable one, not because it is a novelty in the law, but by reason of the great interests involved. The defendant was a life insurance company with a capital stock of \$100,000 and a surplus at the time the action was brought of over \$43,000,000. Its charter provided that a general balance be struck at certain periods, and after deducting a sufficient amount to cover all outstanding risks and other obligations, that an equitable share of the surplus be credited to each policy holder. The plaintiff held a policy which provided that the holder should be entitled to participate in the distribution of the surplus of the company according to such methods as might be adopted by it for distribution; these methods were accepted and ratified by the holder. On the expiration of this policy the plaintiff sought to take with him a proportionate share of the accumulated surplus. The court held that by the terms of the policy the plaintiff was entitled to an equitable share of the distributable surplus only, had no claim upon that reserve fund which was designated by the name of surplus, and that the determination of what portion of the surplus should be distributed among the policy holders rested with the discretion of the directors, whose methods the plaintiff by his contract had ratified and accepted. As to the charter, while not admitting that it could govern the contract, the court said that it clearly gave the company authority to increase its reserve fund for the security of its policy holders and to meet contingent liabilities; and merely because such reserve fund was designated surplus, the plaintiff had no right to a share of it, but only to a share in an amount set apart by the directors.

This decision is clearly correct. Aside from the fact that the word "surplus" is commonly used in two different senses, reserve fund and distributable earnings, of which the latter meaning was the one employed both in the charter and the contract, there is the broader ground that a contract is to be interpreted in the light of the circumstances out of which it grew and which surrounded its adoption. *Reed v. Insurance Co.*, 95 U. S. 23. Clearly it is not only just, but essential from a business point of view, that an insurance company keep on hand a reserve fund to secure that stability which is necessary to its own existence and the proper indemnity of its policy holders. And any contract of insurance

entered into between the plaintiff and defendant must have been made with the understanding that the defendant was to keep such a reserve fund and to add to it as its business extended.

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ADMISSIBILITY OF EVIDENCE ILLEGALLY OBTAINED. — Since the law of evidence is a product of the development of trial by jury, the test of admissibility always has been: is it safe to entrust the fact to a jury; not, is it fair to the other party. It has been held, therefore, that evidence was admissible though obtained by the plaintiff unlawfully. *Legatt v. Tollervey*, 14 East 302. And so evidence found on an unwarrantable search by a private detective has been admitted. *Grindrat v. People*, 138 Ill. 103. Even where the illegal seizure was by a public officer, most jurisdictions have held, that evidence procured thereby is competent. *Com. v. Henderson*, 140 Mass. 303; *Starchman v. State*, 36 S. W. Rep. 940 (Ark.). However, in the recent case of *U. S. v. Wong Quong Wong*, 94 Fed. Rep. 832 (Dist. Ct., Vt.), where private letters of the defendant which had been opened wrongfully by customs officials furnished the evidence on which an order had been issued for his deportation, the order was reversed by the United States District Court. The ground taken by the court was that the evidence was inadmissible since obtained in violation of the Fourth and Fifth Amendments to the Constitution of the United States. This decision deals a sharp blow to a common practice of prosecuting officers hitherto justified on technical grounds of evidence.

From the standpoint of constitutional law it has been urged in the State courts that these amendments were meant simply to restrict the legislature in authorizing and the executive in issuing certain governmental orders; that the duty of the courts was only to punish illegal seizures by executive subordinates and denounce statutes providing for such acts. *Williams v. State*, S. W. Rep. 624 (Ga.). In opposition to this, in *Boyd v. U. S.*, 116 U. S. 616, the Supreme Court of the United States held it was error to admit evidence produced by order of court under such a statute. This case has since been distinguished in the State courts from facts such as those in the principal case, in that here the violation of the defendant's right was by order of court. The principal case, however, put *Boyd v. U. S.*, *supra*, on the broader ground that, admitting the act of a government official violated the protection given by the Constitution, evidence obtained thereby is inadmissible.

There is an intimate relation between the Fourth and Fifth Amendments in these cases. Unwarrantable seizure of papers of an accused by State officials to be used in evidence against him is in effect compelling him to testify against himself. To say that the prohibition of the former is addressed to the executive, of the latter to the judiciary, is to separate what seem naturally connected. To admit as evidence facts found as a result of the violation of these rights accomplishes the sole purpose of the violation and renders the protection practically worthless. One department of the government would be aiding another in violating the fundamental law they both administer. Indeed such admission of evidence would seem to be itself a substantial violation of these amendments. In this view of the case the technicalities of the law of evidence must yield to the broader scope of constitutional interpretation.



## RECENT CASES.

**ADMIRALTY — MARITIME LIENS — JURISDICTION.** — In a suit to enforce a lien given by a State statute, for repairs to a vessel, *held*, that the transaction is maritime in its nature and the State courts have not jurisdiction. *State v. Cox & Sons*, 44 Atl. Rep. (N. J., Sup. Ct.).

The Constitution of the United States, art. 3, sec. 2, declares that "the judicial power shall extend to all cases in admiralty and maritime jurisdiction." An act of Congress provides that the district courts of the United States shall have exclusive jurisdiction of such causes. U. S. Rev. St., § 563. Despite this statute it was formerly held that proceedings such as those in the principal case were valid, on the ground that although Congress was empowered to regulate the matter of repairs to vessels in home ports it had not done so; that until Congress did act, the States had the right to regulate these matters; and that, therefore, State statutes creating liens and providing for their enforcement in State courts were valid. *Randall v. Rohe*, 30 N. J. Law, 220; *Atlantic Works v. Tug Glide*, 150 Mass. 525. But such a contract is clearly maritime in its nature. Accordingly, the Supreme Court has since held that although the State legislatures may regulate the rights of material-men furnishing necessities to vessels, so long as Congress does not interpose to regulate the subject, yet State law cannot take the contract out of the exclusive domain of admiralty jurisdiction. *The Lottawanna*, 21 Wall. 558; *The Glide*, 167 U. S. 606. The principal case is entirely sound in adopting this view.

**AGENCY — INSANITY OF PRINCIPAL — BURDEN OF PROOF.** — The defendant authorized X to execute a mortgage on her property, and afterwards became insane. X, with knowledge of the insanity, made the mortgage. *Held*, that the burden is on the mortgagee to show that he had no knowledge of the insanity at the time of the execution of the mortgage. *Merritt v. Merritt*, 59 N. Y. Supp. 357 (Sup. Ct., App. Div., First Dept.).

Communication by a principal to his agent of a revocation of authority terminates the agency, and thereafter the principal can be bound by the acts of his former agent only upon some ground of estoppel. *Robertson v. Cloud*, 47 Miss. 208. Death of the principal, on the other hand, puts an end to the relation at once, and future acts of the former agent are ineffectual to bind the representatives of the deceased, although the agent and persons dealing with him have acted in good faith. *Harper v. Little*, 2 Me. 14. Insanity of the principal presents an intermediate case. He can or cannot act for himself according as his insanity is partial or total. And so the analogy of revocation is properly followed and the existence of the agency made to depend on whether the agent has knowledge that his principal is so deranged as to make it improper for him to continue to exercise his authority. *Drew v. Nunn*, 4 Q. B. D. 661. Under this rule the agency in the principal case was terminated, and the court rightly held that it lay with the plaintiff to show that the defendant was estopped to deny the agency. But see *contra*, *Campbell v. Hooper*, 3 Sm. & G. 153.

**AGENCY — TORTS OF SERVANT — MOTIVE.** — The defendant's servant in performing his work as janitor moved a table on which the plaintiff's ladder was resting, and as a result the plaintiff was seriously injured. *Held*, that the defendant's liability depends upon the motive of the servant in doing the act. *Lloyd v. Nelson, etc. Co.*, 54 N. E. Rep. 471 (Ohio).

The court in this case accepts the well-settled rule that the master's liability depends upon whether the servant was acting in the course of his employment. *Alabama, etc. R. R. Co. v. Frazier*, 93 Ala. 45; *Philadelphia, etc. R. R. Co. v. Derby*, 14 How. 468. And in holding that an act may or may not be in the course of employment according to the secret intention by which the servant was actuated in doing it, the principal case is not without support. *Wright v. Wilcox*, 19 Wend. 343; *Wood v. Detroit, etc. Ry. Co.*, 52 Mich. 402. On the other hand, it has been suggested that the question is purely one of fact, and that the test to be applied is whether a reasonable third party would suppose the act to be within the scope of employment; that if it really was a way of doing the master's business, however ill-advised, or from what motives adopted, the master should be held liable. *Toledo, etc. Ry. Co. v. Harmon*, 47 Ill. 298; *Billman v. Indianapolis, etc. R. R. Co.*, 76 Ind. 166. The latter view better accords with the general principles of agency and tends to bring the whole subject into greater unity by eliminating where possible the consideration of the agent's intent.

**BANKRUPTCY — DISCHARGE — DESTRUCTION OF ACCOUNT BOOKS.** — Prior to the Bankruptcy Act of 1898, an insolvent merchant destroyed his books of account with intent to defraud his creditors. *Held*, that this does not constitute a ground for refusing him a discharge in bankruptcy proceedings under the act, since such destruction could not have been "in contemplation of bankruptcy." *Re Hirsch*, 96 Fed. Rep. 468 (Dist. Ct., Tenn.).

The Bankruptcy Act of 1867, § 29, provided in express terms that to bar discharge the destruction of books must be subsequent to the passage of the act. But it seems that the omission so to provide in the Bankruptcy Act of 1898, § 14, may be supplied by construction. That act requires that the destruction must be "in contemplation of bankruptcy," a provision not included in the former act. And this phrase, in construing bankruptcy statutes, has always been clearly distinguished from the phrase "in contemplation of insolvency." *Buckingham v. McLean*, 13 How. 151; *Re Black*, 2 Ben. 196; *Re Jones*, 2 Lowell, 451. Hence the expectation of actual legal bankruptcy seems a prerequisite to refusing a discharge under the present law. A debtor, although insolvent, cannot be said to be in contemplation of bankruptcy at a time when the bankruptcy law is not in existence. *Re Holts*, 1 Nat. Bank. News, 204; *Re Stark*, *Id.* 232. Accordingly, the ruling in the principal case commends itself as sound interpretation. In accord are *Re Holman*, 92 Fed. Rep. 512 (Dist. Ct., Iowa); *Sellers v. Bell*, 94 Fed. Rep. 801 (C. C. A.).

**BANKRUPTCY — EXAMINATION OF BANKRUPT — INCRIMINATING EVIDENCE.** — *Held*, that a person under examination before a referee in bankruptcy is not obliged to answer questions which might tend to incriminate him, notwithstanding sec. 7 of the Bankrupt Act, which provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." *In re Rosser*, 96 Fed. Rep. 305 (Dist. Ct., Mo.). See NOTES.

**BILLS AND NOTES — CERTIFICATES OF DEPOSIT.** — *Held*, that a certificate of deposit payable "on return of this certificate properly indorsed," is not due until payment is actually demanded. *Hillsinger v. Georgia R. R. Bank*, 33 S. E. Rep. 985 (Ga.).

An earlier Georgia decision holds that a certificate of deposit payable "on call" is equivalent to a negotiable promissory note payable on demand and so due at once. *Lynch v. Goldsmith*, 64 Ga. 42. The court distinguishes the principal case on the ground that the words "on return of this certificate" create a condition precedent, while the words "on call" do not. But in all such instruments, the words "on return of this instrument" are implied if not expressed, and are held to mean only that the instrument must be given up on settlement. *Smilie v. Stevens*, 39 Vt. 315. The real question is whether the rule, that negotiable demand notes are due at once, should apply to certificates of deposit. It seems on principle that it should, and many courts have so held. *Hunt v. Divine*, 37 Ill. 137. Others, making a distinction on grounds of policy, have held that certificates of deposit, like bank notes, are payable only after actual demand. *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377. In the principal case, too, while desiring not to overrule the earlier case, the court evidently shrinks from the practical consequences of applying the logical analogy.

**BILLS AND NOTES — FORGED CHECKS — NEGLIGENCE OF DEPOSITOR.** — The defendant bank paid checks forged by the plaintiff's clerk, who was also entrusted with the examination of the returned pass-book and vouchers. The plaintiff neglected personally to examine the pass-book, and failed to discover the forgeries for more than two years. *Held*, that the plaintiff cannot recover from the defendant the amount paid on the checks. *Myers v. Southwestern Nat. Bank*, 44 Atl. Rep. 280 (Pa.).

The depositor owes a duty to the bank to use due diligence in examining the returned pass-book and vouchers. If he, or his clerk entrusted with the examination, uses such diligence, whether it results in the discovery of the forgery or not, the depositor can recover from the bank the sums paid out. *Frank v. Chemical Nat. Bank*, 84 N. Y. 213. If, however, the examining clerk is the forger, as in the principal case, and consequently conceals the results of the examination from the depositor, the bank ought not to be held liable. *Birmingham First Nat. Bank v. Allen*, 100 Ala. 476. For since the clerk is the agent of the depositor for the purpose of examining the pass-book, the rules of agency require that the master should be liable for his servant's neglect or misconduct to the prejudice of others. Accordingly, the principal case is supported by the great weight of authority. *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; *Dana v. National Bank of Republic*, 132 Mass. 156.

**CARRIERS — LIABILITY FOR BAGGAGE.** — A travelling salesman checked as his own baggage certain trunks of samples belonging to his employer, the carrier having knowledge of their contents. *Held*, that the owner of the goods can recover for their loss. *Talcott v. Wabash R. R. Co.*, 54 N. E. Rep. 1 (N. Y.).



A carrier's liability for baggage arises from the purely personal relation existing between the carrier and the passenger. Accordingly, it is held that when a passenger checks as his baggage the personal effects of another, the latter cannot hold the carrier for a loss, since the liability was only assumed toward the passenger. *Becher v. Great Eastern R. R.*, 5 Q. B. D. 241; *Meux v. Great Eastern R. R.*, [1895] 2 Q. B. D. 387. Applying this reasoning to the principal case, the owner ought not to have been allowed a recovery, since an absolute liability had not been created as between the carrier and him. On the same ground the case finds no support in those decisions which hold the carrier to a liability when he has received as baggage what he knew was not baggage. *Hannibal R. R. v. Swift*, 12 Wall. 262; *Toledo, etc. R. R. Co. v. Dages, etc. Co.*, 57 Ohio St. 38. There again the waiver can only operate in favor of the passenger.

**CONFLICT OF LAW — CONTRACT — LOCAL LAW APPLICABLE.** — In the South African Republic the defendant contracted not to engage in the brewing business in any part of South Africa for five years. *Held*, that the contract is void under the law of the South African Republic. *South African Breweries, Ltd. v. King*, [1899] 2 Ch. D. 173. See NOTES.

**CONSTITUTIONAL LAW — THIRTEENTH AMENDMENT — INVOLUNTARY SERVITUDE.** — The complainants were sailors and were forcibly detained and compelled to work on board an American vessel under unexpired contracts for their services. *Held*, that they are not being subjected to involuntary servitude within the meaning of the Thirteenth Amendment. *In re Chung Fat*, 96 Fed. Rep. 202 (Dist. Ct., Wash.).

Although the Thirteenth Amendment is not limited in its operation to negro slavery and includes in general all kinds of involuntary servitude, this case is right in holding that it does not apply to the forced performance by sailors of their contracts. *Robertson v. Baldwin*, 165 U. S. 275. For centuries all maritime nations have recognized the necessity of compelling the performance of such contracts. The Constitution and Amendments must be read with reference to such facts as this, and it is safe to say that the broadly stated guaranty of personal liberty in the Thirteenth Amendment was not intended to apply to this well-recognized and salutary exception to the ordinary rule as to contracts for personal services. *Robertson v. Baldwin, supra*, 281. See 10 HARV. LAW REV. 515.

**CRIMINAL LAW — BURGLARY — CONSENT.** — The defendant, "for detective purposes," was incited by a town marshal to commit a burglary, and was furnished with a key to the premises by a clerk. The proprietor had knowledge of the intended burglary, but took no steps to prevent it. *Held*, that the defendant was rightly convicted of burglary. *State v. Abley*, 80 N. W. Rep. 225 (Iowa). See NOTES.

**CRIMINAL LAW — BURGLARY — ENTRY.** — The defendant bored holes into a granary and stole the wheat which ran out. *Held*, that the entry was sufficient to sustain a charge of burglary. *State v. Crawford*, 80 N. W. Rep. 193 (N. D.).

This decision is in accord with the only other case directly in point. *Walker v. State*, 63 Ala. 49. But on principle it may be questioned whether a correct view of the nature of the defendant's act was taken. It is well settled that no entry occurs unless the instrument is intended for the purpose of taking property, or committing some ulterior felony. *Rex v. Hughes*, 1 Leach, 406; *Regina v. O'Brien*, 4 Cox C. C. 398; 2 Bish. Cr. L., 7th ed., § 93. In this case the instrument was intended only to effect an opening, and not to secure the goods, the force of gravity being relied upon to put the grain in the defendant's possession. Whether the auger passed within or not was a matter of indifference to him. It seems, then, that there was not a sufficient breaking to constitute an entry within the technical meaning of that term.

**CRIMINAL LAW — FALSE PRETENCES.** — *Held*, that a conviction for obtaining money by false pretences is valid if the pretences did in fact deceive, even though they would not have deceived an ordinary man, or could have been guarded against by ordinary care. *Lafler v. State*, 54 N. W. Rep. 439 (Ind.).

This case overrules a series of cases in Indiana holding that to support a conviction, the false pretences must be such as are likely to deceive an ordinary man. *State v. Burnett*, 119 Ind. 392; *Shaffer v. State*, 100 Ind. 365. But it is in accord with the present English law, and with most of the authorities in the United States. *Regina v. Woolley*, 1 Den. C. C. 559; *People v. Cole*, 65 Hun. 624. Moreover, it is unquestionably correct, on principle, for every element which the statutes seek to punish is as much present when the one deceived is weak or careless as when he is a man of ordinary intelligence and prudence. Hence objection may likewise be taken to a Massachusetts decision to the effect that the false pretence is not indictable if the one deceived had the same means of information that the party deceiving him had. *Commonwealth v. Norton*, 93 Mass. 266. The force of this case has, however, been somewhat weakened by a later criticism. *Commonwealth v. Mulrey*, 170 Mass. 103.

**EQUITY—SURROGATION—VOLUNTEER.**—The plaintiff thinking, under a mistake of law, that he had a valid mortgage on the defendant's land, paid off a prior mortgage. *Held*, that he is not entitled to be subrogated to the rights of the prior mortgagee. *Brown v. Rouse*, 58 Pac. Rep. 267 (Cal., Sup. Ct.). See NOTES.

**EVIDENCE—ADMISSIBILITY OF EVIDENCE ILLEGALLY OBTAINED.**—On appeal from an order for deportation of Chinese based on private letters seized by customs officials, *held*, that the order is reversed, since the only evidence was illegally obtained, and hence inadmissible. *United States v. Wong Quong Wong*, 94 Fed. Rep. 832 (Dist. Ct., Vt.). See NOTES.

**EVIDENCE—IMPEACHING WITNESS—PREVIOUS INCONSISTENT STATEMENTS.**—*Held*, that a witness cannot be impeached by proof of a previous statement inconsistent with his testimony, unless he has first been asked whether he made such a statement, his attention being called to the time, place, and circumstances of it. *Rice v. Rice*, 60 N. Y. Supp. 97 (Sup. Ct., App. Div., Second Dept.).

The strict rule laid down in this case is supported by the great weight of authority. *Pendleton v. Empire Co.*, 19 N. Y. 13; *Jaspers v. Lano*, 17 Minn. 296; 1 Greenl. Ev., 16th ed., § 462. In a few jurisdictions it is unnecessary to ask the witness about the alleged inconsistent statement before offering direct testimony to prove it; but he may be recalled afterwards to explain or deny it. *Gould v. Norfolk Lead Co.*, 63 Mass. 338; *Cook v. Brown*, 34 N. H. 460. Without defending the unnecessary looseness of the latter doctrine, it may be suggested that the rule adopted in the principal case is too narrow and technical. The matter seems to be one which the law might safely leave to the sound discretion of the trial judge to be settled according to the circumstances in each case. *Hedge v. Clapp*, 22 Conn. 262; *Walden v. Finch*, 70 Pa. St. 460. A hard and fast rule is likely to be used for unfair purposes, and moreover adds an unnecessary complication to a very complicated subject.

**INSURANCE—LIFE INSURANCE—RIGHTS IN SURPLUS.**—The company's charter provided that after the deduction of a sufficient amount to cover outstanding obligations, an equitable share of the surplus be credited to each policy holder. The plaintiff's policy provided that the holder should be entitled to participate in the distribution of the surplus according to such methods as the directors might adopt. *Held*, that the plaintiff is not entitled to an equitable share of the whole surplus, but only of that amount which the directors determined upon for distribution. *Greff v. Equitable Life Assurance Society*, 54 N. E. Rep. 712 (N. Y.). See NOTES.

**MORTGAGES—TACKING—KNOWLEDGE OF ONE OF SEVERAL JOINT MORTGAGEES.**—One of several joint mortgagees made subsequent advances on a first mortgage, with knowledge of an intervening mortgage. *Held*, that the intervening mortgage is not postponed to the subsequent advance. *Freeman v. Laing* [1899] 2 Ch. D. 355.

The case is undoubtedly correct on theory, though there are but few decisions on the point. Where neither mortgage is recorded, it is well settled that a mortgagee making subsequent advances on a first mortgage in ignorance of an intervening second mortgage is entitled to repayment of the subsequent advance in priority to the intervening mortgage. *Boswell v. Goodwin*, 31 Conn. 74; *McDaniels v. Colvin*, 16 Vt. 300. If the first mortgagees have notice of the intervening second mortgage, and the subsequent advance is not obligatory, it is equally well settled that the second mortgage will not be postponed. *Farr v. Nichols*, 132 N. Y. 327; *Union Nat. Bank v. Moline, Milburn, & Stoddard Co.*, 7 N. D. 201. Inasmuch as the joint mortgagees must act in concert throughout the transaction, the court properly looks upon them as a unit, and holds that notice of the second mortgage given to one is equivalent to notice to all.

**PERSONS—BURIAL EXPENSES OF INFANT.**—*Held*, that the funeral expenses of a deceased minor are not a charge against his estate if he leaves surviving a father able to pay them. *Rouse v. Raper*, 54 N. E. Rep. 77 (Ind.).

At common law the husband was liable for the burial expenses of his wife. *Ambrose v. Kerrison*, 10 C. B. 776; *Bradshaw v. Beard*, 12 C. B. N. S. 344. But since the passage of recent statutes giving married women the power to hold property, there has been a tendency on the part of the courts to hold that the estate of a wife is primarily liable for such expenses. *McClellan v. Filson*, 44 Ohio St. 184; *Lightbown v. M'Myn*, 33 Ch. D. 575; *Constantinides v. Walsh*, 146 Mass. 281. This seems but just, for if one is able to meet expenditures made on this account, he should do so. The right of a minor to hold property being as extensive as that of a married woman, on analogy to the preceding cases, the estate of a deceased infant ought in the first instance to be liable for his funeral expenses. But the court in the principal case bases its decision on the ground that in Indiana a father is liable for necessities furnished to a minor



child, and on that ground may be supported. Such a liability is not admitted in other jurisdictions. *Sheldon v. Springett*, 11 C. B. 452; *Kelley v. Davis*, 49 N. H. 187. And there a different result may well be reached. Sch. Dom. Rel., 5th ed., § 242.

**PERSONS — SALE OF LUNATIC'S ESTATE — PURCHASER'S LIEN.** — The guardians of a lunatic sold his real estate without authority of statute or of a competent court. *Held*, that the heirs of the lunatic can recover the land, subject, however, to an equitable lien of the vendee for the purchase-money paid. *Reals v. Weston*, 59 N. Y. Supp. 807 (Sup. Ct., Trial Term).

It is held by the weight of authority that a married woman, who in attempting to convey her real estate has failed to comply with statutory requirements, can recover the land free from any lien of the vendee for the purchase-money paid. *Cahill v. Cahill*, 8 App. Cas. 420; *Brown v. Peckman*, 53 S. C. 1; *Scott v. Battle*, 85 N. C. 184. *Contra*, *Newman v. Moore*, 94 Ky. 147. The principal case raises a question hardly to be distinguished from that decided by these authorities, and its doctrine seems scarcely in accord with principle or justice. The vendee can acquire no direct claim to the land in law or equity, since the parties executing the deed lacked the requisite authority to bind the lunatic's estate. *Buswell, Insanity*, § 105. By making a complete recovery of the land dependent upon repayment of the purchase-money, the court, therefore, accomplishes indirectly what the law does not allow to be done directly, and in effect deprives the lunatic of a protection accorded him by policy of the law. The slight authority that exists on this exact point is opposed to the principal case. *Warden v. Eichbaum*, 14 Pa. St. 121.

**PROPERTY — DEEDS — DELIVERY.** — A deed was given by the grantor to a third person with instructions to return it if the grantor recovered from her present sickness and otherwise to give it to the grantee. *Held*, that this is not a valid delivery. *Williams v. Daubner*, 79 N. W. Rep. 748 (Wis.).

The general rule is that the transfer of a deed to a third person, to be later handed over to the grantee, cannot under any circumstances amount to a delivery, if the grantor reserves a power to recall the instrument. *Pruitsman v. Baker*, 30 Wis. 644; *Stinson v. Anderson*, 96 Ill. 373; *Maynard v. Maynard*, 10 Mass. 456. If no power of recall is reserved, such a transaction will constitute a valid delivery, although the ultimate delivery to the grantee is made dependent upon the happening of a certain condition. *Ruggles v. Lawson*, 13 Johns. 285; *Foster v. Mansfield*, 44 Mass. 412. The question in the principal case, then, is, whether the instrument has been put beyond the control of the grantor. Inasmuch as the grantor cannot control her recovery, and has not reserved the power to recall the instrument before recovery, there seems no good reason for holding the delivery invalid. See II HARV. LAW REV. 129.

**PROPERTY — LANDLORD AND TENANT — DUTY TO REPAIR.** — The landlord of an apartment house, employed an independent contractor to repair the roof. Although the landlord had made no express covenant to keep the premises in repair, *held*, that he is liable for damage to a tenant's property caused by negligence of the contractor. *O'Rourke v. Feist*, 59 N. Y. Supp. 157 (Sup. Ct., App. Div. First Dept.).

By the great weight of authority the landlord of an apartment house is merely bound to use ordinary care in maintaining those portions of the building which remain in his control, in such a manner as not to injure his tenants. *Wood, Landlord and Tenant*, 846; *Stapenhorst v. American Mfg. Co.*, 15 Abb. Pr. N. S. 355; *Toole v. Beckett*, 67 Me. 544; *Priest v. Nichols*, 116 Mass. 401. It is also well settled that an employer is not responsible for the acts of an independent contractor on any ground of agency, since he has no power to control him in the performance of the work. *Morton v. Thurber*, 85 N. Y. 550; *Glickauf v. Maurer*, 75 Ill. 289. There was no claim in the principal case that the defendant failed to use ordinary care either in the choice of the contractor or in the adoption of the method and regulations of the work, and it seems, therefore, that the decision is *contra* to the principles adjudicated in the above cases. *Cf. Lutsbacher v. Dickie*, 6 Daly, 469. The result, moreover, is to impose upon the landlord an absolute duty to keep the premises in repair, — a liability which is hardly justifiable from the mere relation of the parties.

**PROPERTY — LEASE — IMPLIED COVENANT.** — *Held*, that while the words " demise " and " grant " imply a covenant for quiet enjoyment, " let " and " lease " do not. *Mershon v. Williams*, 44 Atl. Rep. 211 (N. J. Sup. Ct.).

In holding to the old common law distinction between these words the New Jersey court is unquestionably occupying conservative ground, and it has the support of some of the more modern cases. *Barnes & Co. v. Lloyd & Sons*, [1895] 2 Q. B. D. 820; *Lovering v. Lovering*, 13 N. H. 513. By the weight of authority in the United States, however, it is held that any words making a lease for a fixed term imply a covenant for

quiet enjoyment. *Avery v. Dougherty*, 102 Ind. 443; *Maule v. Ashmead*, 20 Pa. St. 482; *Brown v. Holyoke Water Power Co.*, 152 Mass. 408. As the distinction taken in the principal case is a purely artificial one, likely to work hardship, this seems the preferable view.

PROPERTY — RIGHT OF SUPPORT — UNSTABLE STRATUM. — The plaintiff and the defendant owned adjoining lots, underlying which was a semi-fluid stratum of asphalt. The defendant excavated on his lot so that the asphalt oozed away from the plaintiff's premises causing subsidence of the surface. *Held*, that the plaintiff can recover for the damage done. *Trinidad Asphalt Co. v. Ambard*, [1899] 2 Ch. D. 317. See NOTES.

PROPERTY — RIPARIAN RIGHTS — EXTENT. — The defendant, a riparian proprietor, carried water from a stream beyond the watershed for purposes of domestic use, and the plaintiff, a lower riparian proprietor, was injured thereby. *Held*, that the defendant's natural right does not allow him to take water beyond said watershed for any purpose whatever to the injury of the plaintiff. *Bathgate v. Irvine*, 58 Pac. Rep. 422 (Cal., Sup. Ct. Com.). See NOTES.

PROPERTY — WILLS — ADOPTED CHILD. — A will gave property to four persons, and provided that "the shares due such as may be deceased shall go to the children of such deceased person, if there be children." *Held*, that an adopted child takes within this description. *Bray v. Miles*, 54 N. E. Rep. 446 (Ind.).

The case presents the question of what is the reasonable interpretation to be put on the word "children" when used by a testator, in the absence of any circumstances of identification. 1 Jar. Wills, 6th Am. ed., 417. The most natural meaning embraces all persons who possess to any considerable extent the attributes of a natural child. An adopted child does possess such attributes, since he stands legally in the position of a natural child as regards rights in his adopted parent's estate. *Power v. Hasley*, 85 Ky. 676; *Barnes v. Allen*, 25 Ind. 222. The result reached in the principal case seems, therefore, to be the more reasonable one, although what few decisions there are on this exact point take the opposite view. *Schafer v. Eneu*, 54 Pa. St. 304; *Russell v. Russell*, 84 Ala. 48.

PROPERTY — WILLS — GIFT TO CLASS. — A testator devised property for life and then to A and the children of B who should attain twenty-one. A died in the testator's lifetime. At the death of the life tenant all of B's children were living and had attained twenty-one. *Held*, that the gift is a gift to a class, and that consequently A's share did not lapse, but went to the children of B. *In re Moss*, [1899] 2 Ch. D. 314.

It has been held that a bequest to A for life, and after that the property "to be equally divided among his surviving children and my niece K. W." was not a gift to a class. *Blakeford v. Blakeford*, 33 Beav. 43. A similar construction was put upon a bequest to the children of A and B and ten others. *In re Chapin's Trusts*, 33 L. J. Ch. 183. But, on the other hand, a gift to A and the children of B has been decided to be a class gift. *Aspinall v. Duckworth*, 35 Beav. 307. The court, reversing the decision of North, J., said that the authorities were in such confusion that they could not be of much assistance. The ground taken was that where a testator gives property to a class, properly so called, and to an individual or individuals, and there is nothing in the rest of the will to negative the view, it is *prima facie* his intention that the property shall go to such of them as shall be living, and that the gift is really a gift to a class. This reasoning commends itself as sound, and hence the principal case, decided in accord with it, cannot be criticised. *In re Spiller*, 18 Ch. D. 614.

PROPERTY — WILLS — OBLITERATION. — *Held*, that words beneath alterations in a will may be substituted as apparent within the meaning of sec. 21 of the Wills Act, upon proof that they can be deciphered by an expert in handwriting using a magnifying glass. *Goods of Braisier*, [1899] P. D. 36.

In a previous case where a will was offered for probate, a paper, on which was written a bequest, was pasted over a legacy. The court refused to remove it. *Goods of Horsford*, L. R. 3 P. D. 211. Later, the same will was before the court, and it being found that the covered passages could be deciphered by placing a piece of brown paper above the pasted slip and holding the document against a window pane in a darkened room, the court allowed probate of the will in the original form. *Finch v. Combe*, [1894] P. D. 191. It was said that chemicals, water, or anything of the kind could not be used, nor could the slips be removed or the document affected in any way. The result of the authorities seems to be that words beneath alterations are "apparent" within the meaning of the Wills Act if they can be deciphered without physical interference with the document itself. *Townley v. Watson*, 3 Cur. Ecc. 761. Accordingly, the principal case was correctly decided. *Lushington v. Onslow*, 6 N. of Cas. 183.



**SURETYSHIP — SUBROGATION — STATUTE OF LIMITATION.** — The plaintiff paid a debt as surety for the defendant, and eleven years thereafter brought an action to have the mortgage enforced for his benefit. The statutory limitation for general equitable relief was ten years, and for foreclosure of mortgages fifteen years. *Held*, that the plaintiff is barred under the ten year clause of the statute. *Zuellig v. Hemerlie*, 53 N. E. Rep. 447 (Ohio).

This decision affirms the doctrine stated *obiter* in an earlier Ohio case. *Neal v. Nash*, 23 Ohio St. 483. In holding that the right of subrogation is purely equitable and independent of the surety's legal rights, the Ohio court takes a position which is certainly preferable to that adopted in some States, where, as soon as the surety's legal remedy on the implied contract of indemnity is barred, *ipso facto* the right of subrogation fails. *Fink v. Muhaffy*, 8 Watts, 384; *Junker v. Rush*, 136 Ill. 179. The decision, however, is not entirely satisfactory. The court declares that the bill involves two actions, one to get control of the mortgage, the other to enforce it, and that since the preliminary relief is barred under the ten year clause of the statute, the plaintiff must fail. Granting the dual character of the bill, this defendant should not have been allowed to interpose any objection to the preliminary relief, the right to do that resting only with the creditor. Moreover, the view taken in the principal case entails an unnecessary and undesirable limitation on the sound principle that the right of subrogation should not fail till such time as the creditor himself would have been barred, if the surety had not paid. *Kinnard v. Baird*, 20 S. C. 377; *Sublett's Admr. v. McKinney*, 19 Tex. 438. There seems to be no valid reason why payment by the surety should not make the creditor a trustee of the mortgage for him, in which case the statute would not begin to run until the creditor had in some way repudiated his liability.

**TORTS — ACTION FOR DEATH — CONTRACT LIMITING LIABILITY.** — A gratuitous passenger expressly agreed not to hold the defendant liable for any personal injuries arising from the negligence of its servants. *Held*, that the agreement is no defence to an action brought for his death by the widow and son, though as between the parties it was binding by the law of Washington. *Adams v. Northern Pac. Ry. Co.*, 95 Fed. Rep. 938 (Cir. Ct., Wash.).

Under statutes similar to that of Washington, which do not expressly provide that no action can be maintained unless the person killed could recover if alive, the rule is well settled that contributory negligence on the part of the deceased bars the statutory action. *Pennsylvania R. R. v. Bell*, 122 Pa. St. 58; *Central, etc. Co. v. Kitchens*, 83 Ga. 83. On similar grounds it is held by the weight of authority, in opposition to the principal case, that any contract between the defendant and the deceased which would bar an action by the latter, were he alive, is a good defence to an action under the statute. *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; *Perkins v. New York, etc. Ry.*, 24 N. Y. 196; *Western, etc. R. R. Co. v. Strong*, 52 Ga. 461. That this is the correct view admits of little doubt. Though the action given by the statute is not a continuation after death of the injured man's right to sue, yet, as the plaintiffs are recovering for a right they possess in him, it is only just that they should be barred by what bars him. The principal case, however, has some support. *Rose v. Des Moines Ry. Co.*, 39 Iowa, 245; *Pennsylvania R. R. v. Henderson*, 51 Pa. St. 315.

**TORTS — CONTRIBUTORY NEGLIGENCE OF CHILDREN.** — *Held*, that a child four and a half years old is incapable of contributory negligence as a matter of law. *Crawford v. Southern Ry. Co.*, 33 S. E. Rep. 826 (Ga.).

*Held*, that a child between seven and fourteen years of age is presumed to be incapable of contributory negligence. *City of Roanoke v. Shull*, 34 S. E. Rep. 34 (Va., C. A.).

By the weight of authority an infant who fails to use the degree of care that an ordinarily prudent child of his own age and experience would use under the circumstances, is negligent. *Stone v. Dry Dock, etc. Co.*, 115 N. Y. 104; *City of Pekin v. McMahon*, 154 Ill. 141; *Philadelphia, etc. Ry. Co. v. Hassard*, 75 Pa. St. 357. This rule is just and rational in neither wholly relieving the child, nor holding him to a standard to which he cannot conform. The first of the principal cases is undoubtedly correct within the above rule, for the judge is only exercising his right to exclude from the jury's consideration that which admits of but one reasonable conclusion. *Burkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; *Schnur v. Citizen's Traction Co.*, 153 Pa. St. 29. The second principal case, however, is inconsistent with the view suggested. Yet it is not without support. *Pratt, etc. Co. v. Brawley*, 83 Ala. 371.

**TORTS — NEGLIGENCE — STATUTORY DUTY.** — A statute imposed upon engineers the duty of giving certain signals at grade crossings. *Held*, that compliance with the terms of the statute relieves the defendant from liability, although he is negligent in giving insufficient signals. *Tessmer v. New York, etc. R. R. Co.*, 44 Atl. Rep. 38 (Conn.).

Generally such statutes are regarded as mere police regulations, in no way altering the rule requiring reasonable care. *Whelan v. New York, etc. R. R. Co.*, 38 Fed. Rep. 15 (Cir. Ct., Ohio); *Flynn v. Canton Co.*, 40 Md. 312. Accordingly, a disregard of them is not considered sufficient proof of negligence without showing its relation to the injury as the proximate cause. *Chrystal v. Troy & Boston R. R. Co.*, 124 New York. 519. And in opposition to the principal case, the general rule is that their observance will not excuse if the circumstances demand greater care. *Bradley v. Boston & Maine R. R.*, 56 Mass. 539; *Calhoun v. Gulf etc. R. R. Co.*, 84 Tex. 226. The latter must be conceded to be the better view. The purpose of these statutes is to add to the safeguards of the public by defining the minimum of care required, rather than to detract from them by lessening the amount of care necessary in some cases. The principal case, however, is not without support. *New York, etc. R. R. Co. v. Leaman*, 54 N. J. Law, 202; *Chicago etc. R. R. Co. v. Dougherty*, 110 Ill. 521.

TORTS—NITRO-GLYCERINE—ABSOLUTE LIABILITY.—An explosion of nitro-glycerine in the defendant's magazine, which occurred in spite of the exercise of due care, injured the plaintiff's building, distant more than a mile. Held, that the plaintiff can recover. *Bradford Glycérine Co. v. St. Mary's Woolen Mfg. Co.*, 54 N. E. Rep. 528 (Ohio).

Authority is almost unanimous in only imposing an absolute liability on those keeping dangerous explosives, when, by reason of the location and surrounding circumstances, the magazine is a nuisance either public or private. *Heeg v. Licht*, 80 N. Y. 579; *McAndrews v. Colterd*, 42 N. J. Law, 189; *Laflin, etc. Powder Co. v. Tearney*, 131 Ill. 322. Such a magazine is a nuisance if the circumstances are such as to make it a reasonable cause of fear to persons living in the vicinity, *Weir's Appeal*, 74 Pa. St. 230, unless, perhaps, "the location is such as to endanger as few persons and as little property as possible, and yet be reasonably accessible as a point of supply and distribution." *Dilworth's Appeal*, 91 Pa. St. 250. The principal case goes beyond these decisions and imposes on the owner an absolute liability under all circumstances. Such a view is clearly open to the objection that it imposes too severe a penalty upon the conduct of a business which is necessary and beneficial to the public.

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## REVIEWS.

A TREATISE ON THE LAW OF BANKRUPTCY. By John Lowell and James Arnold Lowell. Boston: Little, Brown, & Co. 1899. pp. cxxxi, 786.

The senior collaborator in this book, first as Judge of the District Court of Massachusetts, and afterwards as Circuit Judge, was charged with the duty of expounding frequently the Bankruptcy Act of 1867 during the entire period which it was in force; and he fairly earned a right to the title of the ablest and clearest judge in bankruptcy matters who ever sat upon the bench in this country. If one may decide from judicial opinions, he was almost alone among our judges in having a thorough and systematic knowledge of English bankruptcy law as a foundation for construing the American statutes, and to this knowledge was added great clearness of thought and of statement.

It is a matter for sincere congratulation that such a man should have embodied the results of his long consideration of bankruptcy law in a treatise. The book consists of two parts, the first by Judge Lowell on bankruptcy law in general, the second by his son, James A. Lowell, on the Bankruptcy Act of 1898. As the first part was written before the latter act was passed, it necessarily discusses the application of bankruptcy law to earlier acts, and the statements of law made in this part are sometimes contrary to the provisions of the present act. Where this is so the junior author has generally called attention to the fact in a note in



brackets. The only cases where this has not been done seem to be where the change or development in the law has been due to decision, not to statute. Thus the important case of *Re Rouse*, 94 Fed. Rep. 84, though cited in the second part, is not cited under § 125, where Judge Lowell discusses the question to which it relates. So *Re Scott*, 1 N. B. N. 161, and *Re Sapiro*, 92 Fed. Rep. 340, cited in the second part, are appropriate to the discussion in § 159 of the first part. Again, some matters which are discussed in the first part — for instance, many of the old acts of bankruptcy — are obsolete under the present act. It must, therefore, be conceded that the arrangement of the book is a little inconvenient, necessitating as it does an examination in two places to get a complete survey of any topic. But this inconvenience was unavoidable, as Judge Lowell died before the present act was passed. We think Mr. Lowell has pursued the best possible course in preparing his father's work for the press. That work is the work of a master, and should be given, as it has been without change. The bracketed notes of Mr. Lowell will in general prevent any misconception; a little care on the part of the reader will do so in any event.

Mr. Lowell's own share of the book, which is not small, including as it does many citations added in brackets to the notes of the first part, has been done with admirable thoroughness and great discrimination. It is pleasant to hope that he gained something of this in the Law School of which he is a recent graduate, — not all from inheritance. In completeness of treatment and fulness of citations, not only of the Federal decisions, which are in most text-books, but of the decisions of the English and State courts, which frequently are not, the book is unrivalled by any of the large crop of books on bankruptcy. The text of the four United States Bankruptcy Acts, which have been in force at various times, the General orders and Forms in Bankruptcy under the present act, and an excellent index, complete the book.

S. W.

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THE CONSTITUTION OF THE UNITED STATES. A critical discussion of its genesis, development, and interpretation. By John Randolph Tucker. 2 vols. Chicago: Callaghan & Co. 1899. pp. xxxiii, 1015.

This treatise on constitutional law is of peculiar interest, because it gives a thoroughly learned and scholarly presentation of the views of a school radically different from the text-writers with whom we are most familiar; Story, for instance, and Cooley. The author was a Southerner, a Virginian; and his work makes plain that he breathed the same air as the Southern federalists of the old school, the Tuckers and the Randolphs. The federalist characteristics of the work are to be emphasized; but the historian sees, in occasional turns taken by the path of the reasoning, the influence of the pervasive doctrines of State rights.

A generally large view of the powers of the national government is constantly taken. The power of Congress to emit bills of credit, though nowhere expressly conferred, is found to be implied in the grant of power to borrow money. p. 514. And it is hardly fair to say that a narrower construction is used when the power to issue legal tender notes is doubted. p. 515. That doubt has been shared by men of great ability in all parts of the country. A suggestion, however, may be hinted at, that the argument against the legal tender notes — that they were prohibited

to the States, for the States had all powers not prohibited; that no prohibition upon Congress was necessary, for Congress had no powers not delegated — savors a little of State rights. But this suggestion is made somewhat apologetically.

The favor which is shown to the decision of *Prigg v. Pennsylvania*, 16 Pet. 539, and to the rule there asserted that the power to legislate for the return from one State to another of fugitives from labor or service, was exclusive in Congress, is a further indication of the generally broad attitude. p. 632. The contrary view had met with some acceptance, that the subject matter was one of interstate courtesy, and that the surrender of the fugitives was discretionary with the States, in the sense that it could be compelled by no higher power. But the confidence in this contrary view among the advocates of State rights was lessened by the thought that here lurked a peril to slavery, and that as a practical matter a fugitive slave was more likely to be recovered if the recovery were controlled by Congress.

The large view taken of the powers of Congress is shown without possibility of qualification in regard to the control of interstate commerce. This control is declared to be exclusive in Congress, whether or not that body has legislated upon the subject matter. p. 536. The conclusion reached is enforced with determination; it must be admitted that the various phases are hardly dealt with in sufficient detail, and doubtful stands are sometimes taken without enough elaboration to suggest the doubt. Then the Southern point of view appears once more, in the discussion of the case of *Groves v. Slaughter*, 15 Pet. 449, in which a State law prohibiting importation of slaves was upheld. The author goes farther, and maintains that not only the inaction of Congress, but even its positive action, is unequal to the task of compelling the admission of slaves into an unwilling State. p. 555. It is worth noting that the author lays no stress on the notion that slaves were unlike all other articles of commerce under the commerce clause, a class by themselves; on the contrary, he likens them to other articles of commerce of a dangerous nature, which a State has the undoubted right to exclude. There is a grim humor in the analogy drawn between slaves and dynamite.

As a final illustration of the two forces controlling the conclusions reached by the author, his position upon the acquisition and government of territory is worthy of attention. Acquisition of territory he allows, without the suggestion of any limitation; and one of the main reasons why he allows it is, that otherwise an attribute of sovereignty would be lost, for the States surely have no such power. pp. 605-7. Acquisition by treaty is permitted, because a treaty has always been the commonest method by which the nations of the world have acquired territory. Acquisition is also allowed under the clause for admitting new States, and the admission of Vermont is regarded as a direct authority for the admission of Texas — a position, by the way, of very doubtful correctness, in view of the peculiar situation of Vermont. On the other hand, the author refuses to concede that the treaty power includes the power to cede the territory of any State, and he seems to ignore the very argument which he has just used in favor of the acquisition of territory, the argument, that if the nation cannot do this act, no power can do it, and an attribute of sovereignty is lost to the United States. p. 631.

With all of the author's conclusions it is impossible to agree; yet in some instances they are fully as commendable as the doctrines to-day enun-



ciated by the federal courts. The great merit of the work is that it accords large powers to the national government and at the same time has a due regard for the self-government of the States. There is no present danger that the national powers will be belittled; there is danger that the rights of States will be sometimes overlooked. The result to which the law should tend is the recognition of broad national powers together with the recognition of broad powers in the State so long as the latter powers do not hamper the former. As a step in this direction, the present work has a distinct reason for its existence.

J. G. F.

QUESTIONS AND ANSWERS FOR BAR-EXAMINATION REVIEW. By Charles S. Haight and Arthur M. Marsh. New York: Baker, Voorhis & Co. 1899. pp. xlvii, 506.

To avoid possible misunderstanding it may be stated at the outset that this book is not written for the information of laymen, nor as a last resort for the student whose acquaintance with the law is merely colorable. It presupposes a reasonable knowledge of the subjects treated, and is intended to serve simply as a basis for the intelligent sort of reviewing which consists in getting the results of previous study under control for immediate and effective use; and the authors have succeeded in combining the concise statement of legal principles with their practical application in a way that seems admirably adapted for this purpose. The questions are largely in the form of concrete cases illustrating important legal rules, and the answers are clear and precise statements of the law. Naturally there is not much criticism or exposition, but the theory of the law is indicated sufficiently for the purposes of any one who has had a fair amount of legal training. Questionable reasons are given for a few of the rules, but as they are usually supported by respectable authority, the defect is hardly a serious one with respect to bar-examinations. It may be suggested that too many of the questions are based directly on the facts of leading cases. The efficiency of the book in other directions would not suffer and the questions would be more valuable as a test of the student's practical grasp of principles, if he were required to apply them to unfamiliar facts.

In view of the compactness of the volume, and the fact that its table of contents includes the respectable total of twenty titles, it is perhaps unfair to quarrel with the writers for omissions of any but the first importance, yet it occurs to one that separate chapters devoted to Suretyship and the Law of Persons are needed to make the book complete. Serious gaps in the treatment of particular subjects are surprisingly few, and no errors of substantive law have been discovered. Except for the chapter on the New York Code, its usefulness will not be limited to any particular section of the country. The law is stated for all American jurisdictions as far as possible, and where it is impracticable to give all the opposing rules the fact of the conflict is noted. The citations are numerous and, on the whole, well chosen; and there is a complete and detailed index. While the book has the defects necessarily incident to merciless condensation, the work of pruning has been done with care and discrimination.

F. E. H.

THE MASSACHUSETTS LAW OF LANDLORD AND TENANT. By Prescott F. Hall. Boston: George B. Reed. 1899. pp. xl. 534.

Landlord and Tenant Law in Massachusetts has a marked individuality and importance. The subject is relatively large, occasionally whimsical. For example, the doctrine of tenancies from year to year accepted in England and generally in the United States finds no favor in Massachusetts. *Ellis v. Paige*, 1 Pick. 43. And the related rule in *Curtis v. Galvin*, 1 Allen, 215, reminds one forcibly of the old technicalities—such as fines and recoveries. Here, then, is an excellent field for a purely local treatise,—and Mr. Hall's is strictly that. Speaking generally, the work is a valuable labor-saving tool for the working practitioner. As the author points out in his preface, he has endeavored to summarize so as to furnish a complete index to the decisions; to state the law as far as possible in the language of the court; to quote from opinions with sufficient fulness, so that a comparison with the original reports may often be dispensed with; to give not only the substantive law, but matters of pleading, practice and evidence. The value of such a book must necessarily depend on an exhaustive list of authorities, on skill in order and condensation. A brief examination of the author's citations reveals neither omissions nor errors of importance. The more leading cases appear in some half-dozen different places; notably, *Watriss v. Cambridge National Bank*, 124 Mass. 571, which holds that a tenant must remove his fixtures during his term or lose them, and the taking of a subsequent lease of the same premises will not entitle him to remove them during his second term. And the authorities are not entirely confined to Massachusetts. Where the growth of some doctrine is traceable historically to a leading case in a foreign jurisdiction, the author has indicated it. p. 108, *Dumpor's Case*, 40 Co. 119, b. The work is clear in its arrangement, admirable in its condensation, and will prove invaluable as a manual of ready reference.

J. W.

THE LAW RELATING TO CHOSSES IN ACTION. By Walter R. Warren. London: Sweet and Maxwell. 1899. p. xxxi, 456.

This book is practically the first attempt to deal with *choses in action* as a separate branch of the law. The subject, the author explains, is practically incapable of helpful definition; *choses in action* is merely a name descriptive of a great body of rights of various origin which have really no class characteristics. The plan of the book is, in brief, to find out what rights have been considered *choses in action* by the courts, and to examine each species of those rights in regard to its assignability at common law, in equity, or by statutes, with particular reference to the Judicature Act. Then the author takes up the methods of assignment of the various kinds of *choses in action*, both as to voluntary transfers and transfers by operation of law, and finally the English practice in regard to all these matters. The chapters dealing with assignments at common law and in equity seem especially valuable; the discussion of the doctrine of *Dearle v. Hill* is admirable. It is unfortunate that Mr. Warren saw fit to omit any discussion of gifts of *choses in action*—especially debts, specialty debts, and equitable obligations—and the right of a donor to recall them. The first are always revocable; the second, it seems, should be irrevocable, though no one can be sure what is the English law on the subject (see 12 HARVARD LAW REVIEW 498); the third are irrevocable. The distinctions are seldom understood.



The great merits of the book are clearness and definiteness. It seems an adequate compendium of English statutes and practice on *choses in action*. It is surely a helpful summary of their history and the principles which govern them. In the latter aspect, it has a real value for the American lawyer.

J. P. C. JR.

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THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787. By William M. Meigs. Philadelphia: J. B. Lippincott Co. 1900. pp. iv, 374.

It is much to say of a book that it will be an indispensable one to any student of constitutional law, yet this may fairly be said of the book under review. The present volume traces in order the origin and development of each separate clause of the Constitution in the Federal Convention of 1787, from its first suggestion in that body to the form finally approved. Whenever the interpretation of any clause of the Constitution is in question, the development of that clause in the Convention must be considered in any well-advised discussion. Hitherto one was obliged to search out through the indices of Elliot's Debates this development of any particular clause, — pleasant labor always, but in result too often unsatisfactory to one without special learning in the contemporaneous literature of the Constitution. Now any one may find the history of every clause set forth succinctly and accurately in the present volume. The work, as needs be, is almost wholly without originality, but it has for that reason some part of that undying interest which attaches to every motion and every speech in the Federal Convention. However, it is just here that the book fails — in atmosphere. It is too precise, too well arranged. The Constitution grew in the Convention in no such way. Again, fault may be found with the almost entire absence of reference to the originals, and with the failure to grapple with the discrepancies between the Journal of the Convention, the Yates Minutes, and the Madison papers, — but these are conscious and deliberate omissions. And to be quite fair to the author, he has a defined object, and he accomplishes it. Moreover, especial credit is to be given to the appendix; one wonders why these six principal drafts which mark the evolution of the Constitution in the Convention were never collated before.

B. W.

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We have also received: —

REVIEW OF THE CONSTITUTION OF THE UNITED STATES, INCLUDING CHANGES BY INTERPRETATION AND AMENDMENT. By W. G. Bullitt. Cincinnati: The Robert Clark Co. 1899. pp. xii, 360. This manual is described as written for "lawyers and those not learned in the law;" yet it must be confessed that the simple style and strict avoidance of technicality give the book a distinctly popular tone. The people are solemnly warned against an unwarranted assumption of powers by the Executive and Congress, gradual, disguised, but none the less subversive to a republican form of government. The author's conception of the government has a marked southern tone. He finds the sovereignty in the people of the respective States under the Constitution of 1787. He examines that constitution and finds no powers granted to the United States as a whole, — the three departments of the government are the

repositories of the powers and the only agents of the people to manage the affairs of the United States. The government of the United States, he finds, is merely a municipal agent ordained by the people of the States united. The accepted interpretation that each State has contributed an equal share of its power from which to weld a new nation is of course denied. All these are arguments the opponent of State rights cannot overlook. Yet one may doubt if the tone of the book is not too pessimistic, too biassed. At all events, such a vigorous polemic on State rights cannot escape criticism in the light of modern ideas.

THE STATUTORY AND CASE LAW APPLICABLE TO PRIVATE CORPORATIONS UNDER THE GENERAL CORPORATION ACT OF NEW JERSEY AND CORPORATION PRECEDENTS. By James B. Dill. Second Edition. New York: Baker, Voorhis & Co. 1899. pp. xxx, 364. The State of New Jersey, especially during the last twenty-five years, has by liberal legislation invited the formation of large companies. She has offered opportunities for combination impossible in other States, she has allowed her corporations to hold stock in other corporations, and has thus indirectly affected the policy of other States. Mr. Dill's book, therefore, is of more than local interest. The first edition aimed to give concise information as to the organization and management of private corporations under the laws of New Jersey. The text of the statutes was given with reported cases arranged under appropriate headings. Thirteen hundred and thirty-six corporations were organized in New Jersey between January first and August first of the present year, — many of these formed by lawyers from all parts of the Union. The author, therefore, has added to this second edition as a new feature "carefully selected corporations precedents." This alone should give the book a far reaching value. A digest of the reported corporation cases of New Jersey is also added. Mr. Dill's scheme seems clear and carefully elaborated.

THE CIVIL LIABILITY FOR PERSONAL INJURIES ARISING OUT OF NEGLIGENCE. By Henry F. Buswell. Second Edition, revised and enlarged. Boston: Little, Brown & Co. 1899. pp. cxxiii, 545. This volume is much the same as the first edition published in 1893. The text has been revised here and there to conform to changes and developments in the law since that time, and a few new sections, many illustrations taken from recent decisions, and some seventeen hundred citations have been added. In being thus brought down to date the practical value of the work is greatly enhanced. The author's aim is to state the principles which create the relations of plaintiff and defendant in actions for personal injuries caused by negligence; to discuss the law of negligence in this regard, and the rules applicable in cases of liability created by statute; and to consider the general rule of liability as modified by the relation between the parties of employer and employee. The statement of the law is clear and accurate, and, as a rule, there is sufficient explanation of the theory of liability to suit the requirements of the student. The elaborate classification of the subjects is well carried out and exhaustive; although there seems to be no good reason for omitting the much discussed topic of liability for injuries resulting from fright or nervous shock negligently caused.



ABRAHAM LINCOLN. By Norman Hapgood. New York: The Macmillan Co. 1899. pp. xiii, 432. This little book is an attempt to tell intimately the life of Lincoln. It is in no way a history of the time or events with which Lincoln was connected; it aims simply to show the man, the personality. It is always clear-cut and vigorous, excellently expressed. The originality of the author perhaps obtrudes too far: the work is over-emphatic, too blunt, unrestrained, but always interesting and stimulating. The chapters that deal with Lincoln as a lawyer show — more strikingly than the larger biographies — how much he partook of the character of the early American lawyers, — lawmakers, unacademic, careless of technicalities, with the magnificent instinct for justice.

REPORT OF THE SPECIAL AND SECOND ANNUAL MEETINGS OF THE COLORADO BAR ASSOCIATION. Special Meeting at Denver, Colorado, 1899, March 15th; Second Annual Meeting at Colorado Springs, Colorado, 1899, July 6th and 7th. Denver, Colorado: The Smith-Brooks Printing Co. 1899. pp. 187.

LE POUVOIR EXÉCUTIF AUX ÉTATS-UNIS, Étude de Droit Constitutionnel. Par M. Adolphe de Chambrun. Deuxième édition, revue, corrigée et augmentée avec préface de M. Pierre de Chambrun. A. Fontemoing, éditeur. pp. xvi, 336. *Review will follow.*

A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES. By Jairus Ware Perry. Fifth Edition, embodying relevant cases down to date, by John M. Gould. In two volumes. Vol. I. and II. Boston: Little, Brown & Co. 1899. pp. cxlix, 676; xvi, 766. *Review will follow.*

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# HARVARD LAW REVIEW.

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VOL. XIII.

JANUARY, 1900.

No. 5

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## THE DECLARATION OF INDEPENDENCE.

"When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence."—*Jefferson to Henry Lee, May 8, 1825.*

### I.

THE Declaration of Independence, rightly or not, has often been criticised, as lacking in originality. John Adams, concurring in a slur of Timothy Pickering, said of it:—

"As you justly observe, there is not an idea in it but what had been hackneyed in Congress for two years before. The substance of it is contained in the declaration of rights, and the violation of those rights, in the Journals of Congress, in 1774.<sup>1</sup> Indeed, the essence of it is contained

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<sup>1</sup> Declaration of Rights and Grievances, October 14, 1774. It is this state paper, which aroused Dr. Johnson's wrath, and occasioned the tract, "Taxation No Tyranny." "It were a curious, but an idle speculation," says the Doctor, "to inquire, what effect these dictators of sedition expect from the dispersion of their Letter among us. If they believe their own complaints in hardship, and really dread the danger which they describe, they will naturally hope to communicate the same perceptions to their fellow-subjects. But probably in America, as in other places, the chiefs are incendiaries, that hope to rob in the tumults of a conflagration, and toss brands among a rabble passively combustible. Those who wrote the Address though they have shown no great extent of profundity of mind, are yet probably wiser than to believe it; but they have been taught by some master of mischief, how to put in motion the engine of political elec-

in a pamphlet, voted, and printed by the town of Boston,<sup>1</sup> before the first Congress met, composed by James Otis, as I suppose, in one of his lucid intervals, and pruned and published by Samuel Adams."<sup>2</sup>

And again:—

"These two declarations, the one of rights and the other of violations,<sup>3</sup> which are printed in the Journals of Congress for 1774, were two years afterwards recapitulated in the Declaration of Independence, on the Fourth of July, 1776."<sup>4</sup>

And yet again in a more querulous vein:—

"The declaration of independence of 4 July, 1776, contained nothing but the Boston declaration of 1772<sup>5</sup> and the Congress declaration of 1774.<sup>6</sup> Such are the caprices of fortune. This declaration of rights was drawn by the little John Adams. The mighty Jefferson, by the declaration of independence of 4 July, 1776, carried away the glory of the great and the little. J. A. 1813."<sup>7</sup>

Richard Henry Lee, who, in obedience to instructions from the Virginia Convention, moved the Resolution of Independence<sup>8</sup> in

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tricity; to attract by the sounds of Liberty and Property, to repel by those of Popery and Slavery; and to give the great stroke by the name of Boston."

<sup>1</sup> Boston Town Records, November 20, 1772. Samuel Adams, and not James Otis, was the author. <sup>1</sup> Well's Life and Public Services of Samuel Adams, 501, note. Jefferson denies ever having seen the pamphlet. Jefferson to Madison, August 30, 1823, <sup>1</sup> Randall's life of Jefferson, 186.

<sup>2</sup> Adams to Pickering, August 6, 1822, <sup>2</sup> Adam's Life and Works, 512, 514.

<sup>3</sup> Declaration of Rights and Grievances, *supra*.

<sup>4</sup> Autobiography, <sup>2</sup> Adam's Life and Works, 377.

<sup>5</sup> Boston Town Records, November 20, 1772.

<sup>6</sup> Declaration of Rights and Grievances, *supra*.

<sup>7</sup> MS. note to Discourses on Davila, 6 Life and Works, 221, 278. This jealousy of Adams is very characteristic, but in the present instance, seems certainly justifiable. He had borne the brunt of the debate, which resulted in the adoption of the Resolution (July 2), and the Declaration (July 4), of Independence; was older than Jefferson by seven years; had been in Congress continuously, while Jefferson had not; and, undoubtedly, at this time, was a more prominent figure than Jefferson. It is questionable, indeed, whether the members of Congress fully realized the importance that history would attach to the report of the Committee upon the Declaration, and whether they did not themselves singularly underrate the relative value in this respect of the Revolution (July 2), and the Declaration (July 4.) Adams could never master his irritation at Jefferson's fame. He writes, in a letter to Benjamin Rush, May 1, 1807: "Jefferson has acquired such glory by his declaration of independence in 1776, that I think I may boast of my declaration of independence in 1755 [a letter written to Nathan Webb], twenty-one years older than his." <sup>9</sup> Adams's Life and Works, 591, 592.

<sup>8</sup> This Resolution was in these words: "That these United Colonies are, and of right ought to be free and independent States; that they are absolved from all allegi-



Congress, possibly from no higher motives, ascribed the doctrines of the Declaration to Locke.<sup>1</sup> And so far has this disparagement gone, that charges, even, have been made of plagiarism from the spurious North Carolina Mecklenburg Resolves, of May 20, 1775.<sup>2</sup>

## II.

Attempts of this character, hitherto, one and all have signally failed, as they have deserved to fail. Except as a matter of historical, or biographical interest, it makes no difference whether the Declaration was a copy, or an original; for, as Jefferson, in his letter to Madison, of August 30, 1823, submitting Adam's criticisms upon the Declaration, well says, it was not "any part of my

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ance to the British Crown; and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." 6 Force's American Archives (4th series), 1699. Jefferson's conclusion to his original draft of the Declaration was: "We, therefore, the Representatives of the United States of America in General Congress assembled, do, in the Name and by the Authority of the good People of these States, reject and renounce all Allegiance and Subjection to the Kings of Great Britain, and all others who may hereafter claim by, through or under them; We utterly dissolve all political Connection which may have heretofore subsisted between us and the People or Parliament of Great Britain; and finally we do assert and declare these Colonies to be free and independent States," etc. 2 Ford's Writings of Jefferson, 57 and 58. This was changed, so as to conform to the phraseology of the Resolution of July 2, 1776, which, as appears from the above copy thereof, makes no reference to the People or Parliament of Great Britain, but only to the Crown.

<sup>1</sup> "Richard Henry Lee charged it as copied from Locke's treatise on government." Jefferson to Madison, August 30, 1823, 1 Randall's Life of Jefferson, 186.

<sup>2</sup> For references to a discussion of these, see 6 Winsor's Narrative and Critical History of America, 256. They first came to light in the Raleigh Register, April 30, 1819. Adams was much taken aback. He writes to Jefferson, June 22, 1819: "May I enclose you one of the greatest curiosities and one of the deepest mysteries that ever occurred to me? It is in the 'Essex Register' of June 5th, 1819. It is entitled the 'Raleigh Register Declaration of Independence.' How is it possible that this paper should have been concealed from me to this day? Had it been communicated to me in the time of it, I know, if you do not know, that it would have been printed in every whig newspaper upon this continent. You know, that, if I had possessed it, I would have made the hall of Congress echo and re-echo with it fifteen months before your Declaration of Independence." 10 Adam's Life and Works, 380. Jefferson, in his reply to Adams, July 9, 1819, while not expressly denying the authenticity of the Mecklenburg Declaration, states his strong incredulity upon the point: "But what has attracted my particular notice, is the paper from Mecklenburg county, of North Carolina, published in the 'Essex Register,' which you were so kind as to enclose in your last, of June the 22d. And you seem to think it genuine. I believe it spurious. I deem it to be a very unjustifiable quiz, like that of the volcano, so minutely related to us as having broken out in North Carolina, some half dozen years ago, in that part of the country, and perhaps in that very county of Mecklenburg, for I do not remember its precise locality." 3 Randall's Life of Jefferson, 572.

[his] charge to invent new ideas altogether, and to offer no sentiment which had ever been expressed before."<sup>1</sup> The complete answer to such carping is the one here given by Jefferson himself, and indorsed by Madison in his reply, of September 6:—

"Nothing can be more absurd than the cavil that the declaration contains known, and not new truths. The object was to assert, not to discover truths, and to make them the basis of the Revolutionary act. The merit of the Draught, therefore, could only consist in a lucid communication of human rights, in a condensed enumeration of the reasons for such an exercise of them, and in a style and tone appropriate to the great occasion, and to the spirit of the American people."<sup>2</sup>

Or, in the words of Webster:—

"It has sometimes been said, as if it were a derogation from the merits of this paper, that it contains nothing new; that it only states grounds of proceedings, and presses topics of argument, which had often been stated and pressed before. But it was not the object of the Declaration to produce anything new. It was not to invent reasons for independence, but to state those which governed the Congress. For great and sufficient causes, it was proposed to declare independence; and the proper business of the paper to be drawn, was to set forth those causes, and justify the authors of the measure, in any event of fortune, to the country and to posterity. The cause of American independence, moreover, was now to be presented to the world, in such manner, if it might so be, as to engage its sympathy, to command its respect, to attract its admiration; and

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<sup>1</sup> 1 Randall's *Life of Jefferson*, 186. Jefferson, in this letter, also, strikes out at Pickering, who had read the Declaration of Independence, at Salem, July 4, 1823, and on that occasion, had given to the public the contents of Adams's letter. Pickering, in a patronizing way, spoke of the "high tone" of the Declaration, and of the "improvement" that it had undergone by "reduction" to three fourths of its original size." He then went out of his way to commend the Treaty of Peace of 1783 with Great Britain, wherein "the contending parties acknowledged the hand of Divine Providence in disposing the hearts of both 'to forget all past misunderstandings and differences,'" and further to point out the "exact correspondence" of this "solemn profession" with "the fine sentiment happily expressed by Mr. Jefferson in the Declaration of Independence concerning our British Brethren, 'to hold them, as we hold the rest of mankind, enemies in war, in peace friends.'" 4 *Life of Timothy Pickering*, 463. Jefferson retaliated: "Timothy" [such is his disrespectful appellation] "thinks the instrument the better for having a fourth of it expunged. He would have thought it still better, had the other three fourths gone out also, all but the single sentiment (the only one he approves), which recommends friendship to his dear England, whenever she is willing to be at peace with us. . . . In opposition, however, to Mr. Pickering, I pray God that these principles [that is, those of the Declaration] may be eternal." Jefferson to Madison, August 30, 1823, 4 Randolph's *Jefferson's Writings*, 375, 377.

<sup>2</sup> Writings of James Madison, 336.



in an assembly of most able and distinguished men, Thomas Jefferson had the high honor of being the selected advocate of this cause. To say that he performed his great work well, would be doing him injustice. To say that he did excellently well, admirably well, would be inadequate and halting praise. Let us rather say, that he so discharged the duty assigned him, that all Americans may well rejoice that the work of drawing the title-deed of their liberties devolved upon him."<sup>1</sup>

But while it takes nothing from the Declaration of Independence, or the just fame of its author, that it was not the promulgation of a novel creed, but the annunciation of familiar doctrine, yet, notwithstanding, this disclaimer of originality is of the first importance in one aspect. It does not isolate the Declaration of Independence from all other state-papers, and make the Declaration itself the sole source of authoritative interpretation. It leaves open the whole body of contemporary history, as, also, the literature of the times, to clear up ambiguities, or to supply omissions. This is a most essential point.

### III.

No one can compare the Declaration of Independence with the Virginia Bill of Rights without being struck by the remarkable similarity, both in matter, and style, of the two documents.<sup>2</sup>

1. The Declaration says: "All men are created equal." In the original draft: "All men are created equal and independent."

The Bill of Rights says: "All men are by nature equally free and independent." In the original draft: "All men are created equally free and independent."<sup>3</sup>

2. The Declaration says: "They are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness." In the original draft: "From that equal creation, they derive rights inherent and inalienable, among which are the preservation of life, and liberty, and the pursuit of happiness." In an intermediate draft: "They are endowed by their Creator with equal rights, some of which are," etc.

The Bill of Rights says: "And have certain inherent rights, of

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<sup>1</sup> Oration on Adams and Jefferson, Faneuil Hall, Boston, August 2, 1826. 1 Works, 109, 126, 127.

<sup>2</sup> The collation made in this section is based upon the material in 1 Randall's *Life of Jefferson*, and 1 Rowland's *George Mason, Life, Correspondence, and Speeches*.

<sup>3</sup> The report of the committee reads: "All men are born," etc. 6 Force's *American Archives*, 1537, note.

which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." In the original draft: "And have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."<sup>1</sup>

3. The Declaration says: "To secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." In the original draft: "To secure these ends," etc.

The Bill of Rights says: "All power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them." In the original draft: "All power is by God and Nature vested in," etc.<sup>2</sup> Again, "Nor [can men, to wit, those] having sufficient evidence of permanent, common interest with and attachment to the community, [be] bound by any law, to which they have not, in like manner [that is, by themselves, or through their representatives, freely elected, as in case of taxation], assented, for the public [in the original draft, "common"] good."<sup>3</sup>

4. The Declaration says: "Whenever any Form of Government becomes [in the original draft, "shall become"] destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

The Bill of Rights says: "When [in the original draft, "whenever"] any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal."<sup>4</sup>

5. The Bill of Rights has a clause, which the Declaration has

<sup>1</sup> The report of the committee is like the original draft. 6 Force's American Archives, 1537, note.

<sup>2</sup> The report of the committee is like the final draft. *Ib.*

<sup>3</sup> The report of the committee reads: "any laws," and "common good." *Ib.*

<sup>4</sup> The report of the committee is like the original draft. *Ib.*



not (unless the restriction upon the character of the new government to be instituted after revolution be such): "Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community. Of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration."<sup>1</sup> A hereditary monarchy, however, was excluded from this class: "Neither ought the offices of magistrate, legislator, or judge, to be hereditary."<sup>2</sup>

#### IV.

It is a singular fact, that, in all the attacks upon the Declaration, as a copy, and not an original, greater stress has not been laid upon its manifest debt to the Virginia Bill of Rights. If there were no external evidence, the internal evidence itself would be sufficient to convince any candid mind, that there must have been some relation between these two great state-papers, and that they cannot possibly be conceived of as the products of two distinct minds, working apart, one from the other, without opportunity of communication. While similarity of thought, with difference of phrase may exist, and yet there be no necessary connection, identity of thought and phrase (to the extent, at least, that this occurs in the Declaration, and the Virginia Bill of Rights) cannot. If, therefore, there was a desire to rob Jefferson of any title of glory, why has it not been shown, as it readily could have been, that the Bill of Rights was the predecessor of the Declaration, and that the immortal part of the latter was taken from it.

It seems hard to say, unless the discovery of the real truth (as, indeed, was the fact with Adams) was not the sole object of inquiry. Perhaps, also, some investigators have been misled by the letter of Wythe to Jefferson, of July 27, 1776,<sup>3</sup> and that of Jefferson to Woodward, of April 3, 1825.<sup>4</sup> By this evidence, it appears, that Jefferson was the author, practically, of the *preamble* to the Constitution of Virginia. This *preamble*, however, must not be con-

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<sup>1</sup> The report of the committee is like the final draft. 6 Force's American Archives, 1537, note.

<sup>2</sup> The report of the committee reads: "The idea of a man being born a magistrate, a legislator, or a judge, is unnatural, and absurd." *Ib.*

<sup>3</sup> 1 Randall's Life of Jefferson, 195, note.

<sup>4</sup> *Ib.* 195.

founded with the Virginia Bill of Rights. It consists merely of a recapitulation of grievances, similar to that included in the *body* of the Declaration of Independence, and, unlike the Bill of Rights, and the *preamble* to the Declaration of Independence, is not a statement of the Rights of Man.<sup>1</sup>

## V.

Jefferson was not the author of the Virginia Bill of Rights, and never made any claim to being such. On the contrary, he always frankly acknowledged that George Mason was the author. In the letter to Woodward, quoted above, he says: —

"The fact is unquestionable, that the Bill of Rights, and the Constitution of Virginia, were drawn originally by George Mason, one of our really great men, and of the first order of greatness."<sup>2</sup>

And he repeats the statement, in a letter to Henry Lee: —

"That George Mason was the author of the Bill of Rights, and of the constitution founded on it, the evidence of the day established fully in my mind."<sup>3</sup>

If further corroborative proof be needed, it may be found in the recent biography of George Mason, which deals of this matter in detail.<sup>4</sup>

## VI.

It only remains to establish the relation of Jefferson to the Virginia Bill of Rights. While, as has been said, the internal evidence is such as to leave no doubt in an unprejudiced mind, yet, perhaps, it is fair, that the physical possibility of such relation should be demonstrated. It is true, that, in 1823, in the letter to Madison, Jefferson says: —

"Whether I had gathered my ideas from reading or reflection, I do not know. I know only that I turned to neither book nor pamphlet while writing it."<sup>5</sup>

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<sup>1</sup> Ford, the latest editor of Jefferson, frankly admits the similarity of the *preamble* of the Declaration to the Virginia Bill of Rights: "A comparison of the former [the *preamble* of the Declaration] with the Virginia Declaration of Rights would seem to indicate the source from which Jefferson derived a most important and popular part." *Ford's Writings of Jefferson*, 25.

<sup>2</sup> Jefferson to Woodward, April 23, 1825, 1 *Randall's Life of Jefferson*, 195.

<sup>3</sup> Jefferson to Henry Lee, May 8, 1825, 1 *Rowland's George Mason, Life, Correspondence, and Speeches*, 253.

<sup>4</sup> *Rowland's George Mason, Life, Correspondence, and Speeches*, c. vii.

<sup>5</sup> Jefferson to Madison, August 30, 1823, 1 *Randall's Life of Jefferson*, 186.



But this was nearly fifty years after the event, — and less than three before his death, — when the particular circumstances attending composition may well have passed out of his mind, or become dimmed by lapse of time. One thing is certain, there are passages in the Declaration of Independence so nearly like passages in Jefferson's "Draft of a Virginia Constitution,"<sup>1</sup> and "A Summary View of the Rights of British America,"<sup>2</sup> that the conclusion seems inevitable, that, at the time of the drafting of the Declaration, Jefferson must have had one, or possibly both, of these documents before him. However that may be, it can easily be established, that the Virginia Bill of Rights, either in the form in which it was presented to the Virginia Convention, or that in which it was finally adopted by it, was in Philadelphia, in season to have been consulted by Jefferson. The committee to draft the Declaration of Independence was chosen<sup>3</sup> by the Continental Congress, June 11, 1776, and did not make its report thereto till June 28 following. The Bill of Rights was reported to the Virginia Convention, May 27, 1776, and was adopted by it, June 12, 1776. Thomas Ludwell Lee, a member of the Virginia Convention, writes from Williamsburg to Richard Henry Lee, at Philadelphia, June 1, 1776: "I enclosed you by last post a copy of our Declaration of Rights nearly as it came through Committee. It has since been reported to the Convention."<sup>4</sup> On the day that it was reported to the Convention, it was ordered "printed for the perusal of the members."<sup>5</sup> June 10, 1776, Josiah Bartlett, one of the delegates from New Hampshire, then present in Congress, writes from Philadelphia to John Langdon: "I shall enclose you a paper containing the Bill of Rights drawn up by Virginia."<sup>6</sup> It is evident, therefore, that the Virginia Bill of Rights was in circulation, in manuscript, or print among the members of Congress, at Philadelphia, in the first days of June, and that like the instructions to the Virginia delegates on Independence, of May 15, 1776, had attracted wide attention. Under these circumstances, it is impossible to believe, that Jefferson, a member of the delegation that introduced the Resolution of Independence, and

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<sup>1</sup> 2 Ford's Writings of Jefferson, 7.

<sup>2</sup> 1 Ford's Writings of Jefferson, 421.

<sup>3</sup> The Journals say, "appointed," but, from a thorough examination of them, it will appear, that this word was used by Charles Thomson, the Secretary, in cases of "election."

<sup>4</sup> 1 Patrick Henry, Life, Correspondence and Speeches, 424.

<sup>5</sup> 6 Force's American Archives (4th Series), 1538.

<sup>6</sup> Ib. 1026, 1027.

heartily in sympathy with Lee in respect of the expediency of it, should have remained ignorant of what was common knowledge among other members of Congress, if not, at large, among the public itself. And if there was no impossibility of his being familiar with Mason's draft of the bill of rights, who can doubt, after a comparison of the two papers, such as has been made here, that much of the *preamble* of the Declaration of Independence, if not in substance, in form, was taken, — and by taken, is, by no means, meant improperly taken, — but taken, — and taken as the occasion justified — from the Virginia Bill? For, as has been demonstrated, George Mason, and not Jefferson, was the author of that bill.

## VII.

The importance of this historical fact, if fact it is, lies in this: that the Virginia Bill of Rights is much more explicit than the Declaration of Independence, and more clearly indicates than the Declaration does the source of its origin. The Bill of Rights is plainly founded upon the "social compact" theory of government, and the terminology is the terminology of Locke, and other like writers, who have founded government upon the "social compact" basis. Indeed, the Virginia Bill of Rights uses the specific word, "compact," and, in its amended form, contains the phrase, "when they [men] enter into a state of society." Of this theory, then, George Mason and Jefferson were the modern expounders.

## VIII.

What, therefore, is meant by the phrases in the Declaration of Independence, "All men are created equal"? "Unalienable Rights of Life, Liberty, and the pursuit of Happiness"? "Governments derive their just powers from the consent of the governed"? and that other phrase, in the introduction to the *preamble*, not hitherto referred to: "Nature, and Nature's God"?

Are these phrases, as the Declaration asserts, (of all but the last), "self-evident truths," or are they, as Rufus Choate said, "glittering and sounding generalities"?<sup>1</sup>

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<sup>1</sup> "If it [the Republican Party] accomplishes its objects, and gives the government to the North, I turn my eyes from the consequences. To the fifteen States of the South that government will appear an alien government. It will appear worse. It will appear a hostile government. It will represent to their eye a vast region of States organized upon anti-slavery, flushed by triumph, cheered onward by the voices of the



Do they stand for the freedom of the slave? For negro suffrage? For Indian suffrage? For manhood suffrage? For woman suffrage? For universal suffrage? For a republic? For representative government? And if for these, or any of these, for these, and any of these, without limitation, or qualification? Do they apply to barbarous states, as well as to civilized states? To all sorts and conditions of men, the uneducated as well as educated, with property or without? Or did the framers of the Declaration intend a different application? And, if a different application, what application?

## IX.

The answer to these questions, or to many of them, must, in the nature of things, always remain more or less debatable. And yet it will not do to say, that there is no answer, and still less, to take refuge in empty rhetoric. There is much wit in the remark, apropos of the Declaration: "No intelligent man has ever misconstrued it, unless intentionally;"<sup>1</sup> but such an answer is hardly convincing. It may suffice for the arguments of the Confederacy, Utah polygamists, and woman suffragists, — those who have carried the doctrines of the Declaration to an absurdity, but it is not the answer which the vital importance of the question, seriously considered, fairly demands. And while perhaps, as has been intimated, no answer can be given, wholly free from dispute, yet this is far from saying that no progress is possible towards a correct solution.

## X.

Several things can be predicated of the Bill of Rights and the Declaration:

1. Their first care was the justification of the Colonists in the right of revolution.<sup>2</sup>
2. They were adopted with no intention of conferring suffrage upon the negro, and probably with none of freeing him.<sup>3</sup>

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pulpit tribune, and press; its mission to inaugurate freedom, and put down the oligarchy; its constitution the *glittering and sounding generalities* of natural right which make up the Declaration of Independence. And then, and thus is the beginning of the end." — Rufus Choate to the Maine Whig State Central Committee, August 9, 1856, 1 Brown's Works of Rufus Choate, 212, 215.

<sup>1</sup> Morse's Life of Jefferson, 40.

<sup>2</sup> Introduction to the *preamble* of the Declaration.

<sup>3</sup> The portion of the Declaration relating to the slave trade was struck out, from political exigencies. Lincoln said in his speech, in Chicago, July 10, 1858: "I should

3. They had no relation to woman suffrage, in fact, to the suffrage, at all, manhood, property, universal, or otherwise.<sup>1</sup>

like to know, — taking this old Declaration of Independence, which declares that all men are equal upon principle, and making exceptions to it, — where will it stop? If one man says it does not mean a negro, why not another say it does not mean some other man? If that Declaration is not the truth, let us get the statute book in which we find it, and tear it out." 1 Complete Works, 247, 259. He was speaking of what it should be held to mean then, rather than of what it was held to mean in 1776, but, even thus, he took pains to guard himself later at Charleston, Ill., September 18, 1858, as follows: "I will say that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races — that I am not, nor ever have been, in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality." 1 Complete Works, 369. What he believed that the rights of the negro were, he had defined in a previous speech, at Ottawa, August 21, 1858: "I agree with Judge Douglas, he [the negro] is not my equal in many respects — certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without the leave of anybody else, which his own hand earns, he is my equal, and the equal of Judge Douglas, and the equal of every living man." 1 Complete Works, 286, 289. Whatever the original meaning was, the Declaration left the slave as it found him. "Upon the revolution, no other change took place in North Carolina than was consequent on the transition from a colony dependent on a European king, to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, remained aliens. Slaves, manumitted here, became freemen, and, therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the State are born citizens of the State." *State v. Manuel*, 4 Dev. & Bat. 20, quoted with approval by Judge Curtis in the *Dred Scott* Case. Edmund Randolph's MS. "History of Virginia" would seem to indicate, that the difficulty was smoothed over in the Virginia Convention, on the hypothesis, that slaves were property. He says: "The Declaration in the first article of the bill of rights, that all men are by nature equally free and independent, was opposed by Robert Carter Nicholas, as being the forerunner, or pretext, of civil convulsion. It was answered, perhaps, with too great an indifference to futurity, and not without inconsistency, that, with arms in our hands, asserting the general rights of man, we ought not to be too nice, and too much restricted, in the delineation of them, but that slaves, not being constituent members of our society, could never pretend to any benefit from such a maxim." Conway's Edmund Randolph, 30.

<sup>1</sup> "When the Federal Constitution was adopted, all the States with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power." *Minor v. Happersett*, 21 Wall. 162, 172. The new constitutions made the following minimum stipulations as preliminary to the suffrage: New Jersey (1776), property; Pennsylvania (1776), taxes; Maryland (1776), property; North Carolina (1776), taxes; Georgia (1777), property, or mechanical trade; New York (1777), property; Massachusetts (1780), property; New Hampshire (1784), poll tax; Rhode Island (charter), Connecticut (charter), South Carolina (1776), Virginia (1776), and Delaware (1776), as before. It is interesting to note particularly, that Virginia retained her previous high property qualification.



4. They had no relation to the Indians.<sup>1</sup>

5. They did not assert, that the Colonists had a right of representation in Parliament, — that right the Colonists waived as impracticable, and did not want, — nor yet, that the Colonists desired an opportunity to interfere with imperial concerns, — they were willing to leave these entirely to a Parliament, in which they were not represented. What the Bill and Declaration did complain of, was the novel interference by the King and Parliament with the local affairs of the colonies, which had always hitherto been left solely to the Colonial legislatures, and, more particularly, of the taking of the property of the Colonists, in the shape of taxes, without their consent.

6. The Bill and Declaration were adopted by men mainly of British descent, — the equals of native-born subjects, — with the same capacity for government, — and morally entitled to the same rights. And the claims made by the Bill and Declaration, if not in terms, in fact, were made of a form of government, and state of society, that were civilized.

7. There was no *necessary* antagonism between the Declaration of Independence, and a monarchy. That is to say, it did not preach a crusade against all kingdoms. Nor does the Bill of Rights, though possibly more radical, do that.

## XI.

It is impossible, within the scope of the present article, to develop these different propositions at full length. And, indeed, most of them are so indisputable as to make development superfluous. The most superficial knowledge of American history is sufficient to remove all doubt as to the first four, and, possibly, even as to the fifth, sixth, and seventh. The last three, however, while unques-

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<sup>1</sup> Talk to the Six Nations, of July 13, 1775: "Brothers and Friends! We desire you will hear and receive what we have now told you, and that you will open a good ear, and listen to what we are now going to say. This is a family quarrel between us and old England. You Indians are not concerned in it." (The Six Nations, however, were inhabitants of New York State.) Journals of Congress, July 13, 1775. The committee consisted of five members: Philip Schuyler (N. Y.); Patrick Henry (Va.); James Duane (N. Y.); James Wilson (Penn.); and Philip Livingston (N. Y.). See also, *Elk v. Wilkins*, 112 U. S. 94: "The members of these tribes [Indian tribes] owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupillage, resembling that of a ward to his guardian" (p. 97).

tionably not admitting of much doubt, may yet perhaps be not entirely so axiomatic as the others, and should receive, therefore, a brief word or two by way of explanation.

## XII.

And, *first*, of proposition 5, that the Colonists made no complaint, of non-representation in Parliament, to act upon imperial affairs, but, on the contrary, rather feared, that this right might be conceded to them.

January 30, 1768, Samuel Adams wrote to Dennys Deberdt, the Massachusetts colonial agent, in London : —

"You will observe that the House still insist upon that inestimable right of nature and the Constitution of being taxed only by representatives of their own free election ; which they think is infringed by the late acts for establishing a revenue in America. *It is by no means to be understood that they desire a representation in Parliament, because, by reason of local circumstances, it is impracticable, that they should be equally and fairly represented. There is nothing, therefore, the Colonies would more dread.*"<sup>1</sup>

The assertion is frequently reiterated.

In the Declaration of Rights and Grievances, of October 14, 1774 : —

"*Resolved, 4. That the foundation of English liberty and of all free government, is a right in the people to participate in their legislative council ; and as the English colonists are not represented, and from their local and other circumstances cannot properly be represented, in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed.*"<sup>2</sup>

This paragraph contains such a definite, and exact, statement of the position of the Colonists, prior to the Revolution, that it is worth quoting in full : —

"But from the necessity of the case, and a regard to the mutual interests of both countries, we cheerfully consent to the operation of such acts of the British Parliament as are *bona fide* restrained to the regulation of our external commerce, for the purpose of securing the commercial ad-

<sup>1</sup> 1 Wells's Life and Public Services of Samuel Adams, 167, 168.

<sup>2</sup> Journals of Congress, October 14, 1774.



vantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent.”<sup>1</sup>

In the Address to the People of Great Britain, of October 21, 1774:—

“You have been told that we are seditious, impatient of government, and desirous of independency. Be assured that these are not facts, but calumnies. . . .

“Place us in the same situation that we were at the close of the last war, and our former harmony will be restored.”<sup>2</sup>

In the Petition to the King, of October 25, 1774:—

“We wish not a diminution of the prerogative, nor do we solicit the grant of any new right in our favor. *Your royal authority over us, and our connection with Great Britain, we shall always carefully and zealously endeavor to support and maintain.*”<sup>3</sup>

In the Second Address to the People of Great Britain, of July 8, 1775:—

“After the most valuable right of legislation was infringed; *when the powers assumed by your parliament in which we are not represented, and from our local and other circumstances cannot properly be represented, rendered our property precarious*; after being denied,” etc., etc.<sup>4</sup>

In the Reply to Lord North’s “Conciliatory Proposals,” of July 31, 1775:—

<sup>1</sup> Journals of Congress, October 14, 1774. The committee consisted of twenty-seven members, as follows: N. H., Nathaniel Folsom, John Sullivan; Mass., Samuel Adams, John Adams, Thomas Cushing; R. I., Stephen Hopkins, Samuel Ward; Conn., Eliphalet Dyer, Roger Sherman; N. Y., James Duane, John Jay; Penn., Edward Biddle, Joseph Galloway, Thomas Mifflin; N. J., John de Hart, William Livingston; Md., Robert Goldsborough, Thomas Johnson; Del., Caesar Rodney, Thomas M’Kean, Va., Patrick Henry, Richard Henry Lee, Edmund Pendleton; S. C., Thomas Lynch, John Rutledge; N. C., Joseph Hewes, William Hooper.

<sup>2</sup> Journals of Congress, October 21, 1774. The committee consisted of three members, as follows: Richard Henry Lee (Va.); [William] Livingston (N. J.); and John Jay (N. Y.).

<sup>3</sup> Journals of Congress, October 25, 1774. The committee consisted of six members, as follows: Richard Henry Lee (Va.); John Adams (Mass.); Thomas Johnson (Va.); Patrick Henry (Va.); [John] Rutledge (S. C.); and John Dickinson (Penn.).

<sup>4</sup> Journals of Congress, July 8, 1775. The committee consisted of three members, as follows: Richard Henry Lee (Va.); Robert R. Livingston (N. Y.); and Edmund Pendleton (Va.).

"While *parliament* pursue *their plan* of civil government within *their own* jurisdiction, *we* also hope to pursue *ours* without molestation."<sup>1</sup>

And in the Reply to the Royal Proclamation, August 23, 1775, of December 6, 1775: —

"We condemn, and with arms in our hands, a resource which freemen will never part with, we oppose the claim and exercise of *unconstitutional powers, to which neither the crown nor parliament were ever entitled.*"<sup>2</sup>

### XIII.

*Secondly*, of proposition 6, that the Colonists spoke for, and in the name of, themselves, as British subjects, the equals, in all respects, of those native-born within the kingdom.

The instances of this character are so numerous as almost to defy recapitulation. Several examples, however, will suffice.

In "A Summary View of the Rights of British America," published by order of the Virginia Convention of 1774, Jefferson says: —

"To remind him [the King] that our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe," etc.<sup>3</sup>

See also: —

Declaration of Rights and Grievances, of October 14, 1774: —

"*Resolved*, 2. That our ancestors, who first settled these Colonies, were at the time of the emigration from the mother Country, entitled to all the rights, liberties, and immunities of free and natural born subjects, within the realm of England.

"*Resolved*, 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy."<sup>4</sup>

Address to the People of Great Britain, of October 21, 1774: —

<sup>1</sup> Journals of Congress, July 31, 1775. The committee consisted of four members, as follows: Benjamin Franklin (Penn.); Thomas Jefferson (Va.); John Adams (Mass.); and Richard Henry Lee (Va.).

<sup>2</sup> Journals of Congress, December 6, 1775. The committee consisted of three members, as follows: Richard Henry Lee (Va.); James Wilson (Penn.); and William Livingston (N. J.).

<sup>3</sup> 1 Ford's Writings of Thomas Jefferson, 421, 429.

<sup>4</sup> Journals of Congress, October 14, 1774.



"*Know then*, that we consider ourselves, and do insist, that we are and ought to be, as free as our fellow subjects in Britain, and that no power on earth has a right to take our property from us, without our consent.

"That we claim all the benefits secured to the subject by the English constitution," etc.<sup>1</sup>

Petition to the King, of October 25, 1774: —

"The apprehension of being degraded into a state of servitude, from the pre-eminent rank of English freemen," etc.<sup>2</sup>

Address to the Inhabitants of Quebec, of October 26, 1774: —

"On the solid foundation of this principle, Englishmen reared up the fabric of their constitution, with such a strength, as for ages to defy time, tyranny, treachery, internal and foreign wars; and, as an illustrious author [Montesquieu] of your nation, hereafter mentioned, observes: 'They gave the people of their colonies the form of their own government, and, this government carrying prosperity along with it, they have grown great nations in the forests they were sent to inhabit.'"<sup>3</sup>

Declaration upon Taking Up Arms, of July 6, 1775: —

"Our forefathers, inhabitants of the island of Great Britain, left their native land, to seek on these shores a residence for civil and religious freedom. At the expense of their blood, at the hazard of their fortunes, without the least charge to the country from which they removed, by unceasing labor, and an unconquerable spirit, they effected settlements in the distant and inhospitable wilds of America, then filled with numerous warlike nations of Barbarians. Societies or governments, vested with perfect legislatures, were formed under charters from the Crown, and an harmonious intercourse was established between the colonies and the kingdom from which they derived their origin."<sup>4</sup>

Reply to Royal Proclamation, August 23, 1775, of December 6, 1775: —

"By the British constitution, our best inheritance, rights, as well as duties, descend upon us. We cannot violate the latter by defending the

<sup>1</sup> Journals of Congress, October 21, 1774.

<sup>2</sup> Journals of Congress, October 25, 1774.

<sup>3</sup> Journals of Congress, October 26, 1774. The committee consisted of three members, as follows: Thomas Cushing (Mass.); Richard Henry Lee (Va.); and John Dickinson (Penn.).

<sup>4</sup> Journals of Congress, July 6, 1775. The committee consisted of seven members, as follows: John Rutledge (N. C.); William Livingston (N. J.); Benjamin Franklin (Penn.); John Jay (N. Y.); Thomas Johnson (Md.); John Dickinson (Penn.); Thomas Jefferson (Va.).

former. We should act in diametrical opposition to both, if we permitted the claims of the British parliament to be established, and the measures pursued in consequence of those claims to be carried into execution among us. Our sagacious ancestors provided mounds against the inundation of tyranny and lawless power on one side, as well as against that of faction and licentiousness on the other. On which side has the breach been made?

"We mean not, however, by this declaration, to occasion or to multiply punishments. Our sole view is to prevent them. In this unhappy and unnatural controversy, in which Britons fight against Britons, and the descendants of Britons, let the calamities immediately incident to a civil war suffice. We hope," etc.<sup>1</sup>

And so on, *ad infinitum*.

#### XIV.

*Thirdly*, of proposition 7, that the Declaration of Independence was not a war upon all monarchy, constitutional or otherwise, here and elsewhere. It is not as sweeping, in this particular, as the Virginia Bill of Rights, and it would probably have surprised even the author of that, if he had been given to understand, that the Bill of Rights questioned the title of George III. to the throne of Great Britain. Even as late as December 6, 1775, the Colonists, in their Reply to the Royal Proclamation, August 23, 1775, say: —

"What allegiance is it that we forget? Allegiance to parliament? We never owed, — we never owned it. Allegiance to our king? Our words have ever avowed it, our conduct has ever been consistent with it."

The principles of the Revolution were not of such mushroom growth. As Bancroft says: —

"In the next place, the declaration, avoiding specious and vague generalities, grounds itself with anxious care upon the past, and reconciles right and fact. Of universal principles enough is repeated to prove that America chose for her own that system of politics which recognizes the rule of eternal justice: and independence is vindicated by the application of that rule to the grievous instructions, laws and acts proceeding from the King, in the exercise of his prerogative, or in concurrence with the lords and commons of Great Britain. The colonies professed to drive back innovations, and not, with roving zeal, to overturn all traditional inequalities; they were no rebels against the past, of which they knew

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<sup>1</sup> Journals of Congress, December 6, 1775.



the present to be the child ; with all the glad anticipations of greatness that broke forth from the prophetic soul of the youthful nation, they took their point of departure from the world as it was. They did not declare against monarchy itself ; they sought no general overthrow of all kings ; no universal system of republics ; nor did they cherish in their hearts a lurking hatred against princes. Till within a few years or months, loyalty to the house of Hanover had been to them another name for the love of civil and religious liberty ; the British constitution, the best system that had ever been devised for the security of liberty and property by a representative government. Neither Franklin nor Washington, nor John Adams, nor Jefferson, nor Jay had ever expressed a preference for a republic.<sup>1</sup> The voices that rose for independence spoke also for alliances with kings. The sovereignty of George III. was renounced, not because he was a king, but because he was deemed to be a tyrant."<sup>2</sup>

## XV.

If Judge Taney was wrong upon the point of constitutional law involved in the Dred Scott case, he was, at least, right in demanding, that the principles of the Declaration be brought into conformity with the acts of those who professed them. He says: —

"The general words, above quoted ['All men,' etc.], would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration ; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the declaration of independence would have been utterly and flagrantly inconsistent with the principles they asserted ; and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation."<sup>3</sup>

The key to this problem, and other problems, before suggested, is to be found in Locke.

## XVI.

The Declaration, primarily, had one thing, and one thing only, in view, and that was, a justification of the separation of the Colonies from Great Britain, and incidentally, therefore, a defence of

<sup>1</sup> Query, if text would not be more exact, with the words, "had ever," omitted?

<sup>2</sup> 4 Bancroft's History of the United States, 451.

<sup>3</sup> Dred Scott v. Sandford, 19 How. 393, 410.

the rights of revolution in respect of the then condition of the original thirteen States. To this end, the lawyers of the day, who were, for the most part, the framers of state-papers then as now, turned to Locke's essay, and other kindred writings, to establish the justice of their contention. Locke's essay, as is said by him in the preface, was written in defence of the English Revolution of 1688,<sup>1</sup> and he had to prove, as the Colonies had to prove, that there was no such thing as the divine right of kings, and that, when a government failed to be true to its trust, it was the right, inherent, and inalienable, of the people, "to alter or abolish it, and to institute new government." Otherwise, there could have been no justification for that series of events, which, at the close of the 17th century, resulted in the replacing of James the Second upon the throne by William, Prince of Orange. Locke accomplished his object in this way: He first demolished the patriarchal theory of government, as descending from God through Adam, defended by Sir John Filmer in an essay, called "Patriarcha, or the Natural Power of Kings;" and then proceeded to the true foundation of civil society. Like other writers of his, and the 18th centuries, he traced this to the state of Nature,<sup>2</sup> and asserted that, in that state, all men are "equal" and "independent."<sup>3</sup> These are the exact words of the original draft of the Declaration; and, also, of the Bill of Rights. By "equal" and "independent," Locke did not

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<sup>1</sup> "Thou hast here the beginning and end of a discourse concerning government: what fate has otherwise disposed of the papers that should have filled up the middle, and were more than all the rest, it is not worth while to tell thee. These which remain I hope are sufficient to establish the throne of our great restorer, our present King William; to make good his title in the consent of the people; which being the only one of all lawful governments, he has more fully and clearly than any prince in Christendom; and to justify to the world the people of England, whose love of their just and natural rights, with their resolution to preserve them, saved the nation when it was on the very brink of slavery and ruin." Preface to the Two Treatises.

<sup>2</sup> "To understand political power right, and derive it from its original, we must consider what estate all men are *naturally* in." Second Treatise, § 4.

<sup>3</sup> "A state of *perfect freedom* to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man. A state also of *equality* wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection." Second Treatise, § 4. Again: "The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal* and *independent*, no one ought to harm another in his life, health, liberty, or possessions," etc. *Ib.* § 6.



mean, that every man was born of the same height, or with the same mental or physical vigor,<sup>1</sup> but "equal," in the case of rational beings,<sup>2</sup> in respect of the laws of Nature, and the primordial right to enforce these laws. Every man according to Locke, until a state of society was entered into, was entitled to enforce the laws of Nature;<sup>3</sup> and it was only, when society was formed, that this right of enforcement was transferred from the individual to the government.<sup>4</sup>

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<sup>1</sup> "Though I have said above, 'That all men by nature are equal,' I cannot be supposed to understand all sorts of equality: age or virtue may give man a just pre-eminence: excellency of parts and merit may place others above the common level: birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude, or other respects, may have made it due; and yet all this consists with the equality which all men are in, in respect of jurisdiction or dominion one over another; which was the equality I there spoke of, as proper to the business in hand, being that equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man." *Second Treatise*, § 54.

<sup>2</sup> "The freedom then of man and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will. To turn him loose to an unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature to be free, but to thrust him out amongst brutes and abandon him to a state as wretched, and as much beneath that of a man, as theirs. This is that which puts the authority into the parent's hands to govern the minority of their children. God hath made it their business to employ this care on their offspring, and hath placed in them suitable inclinations of tenderness and concern to temper this power, to apply it, as His wisdom designed it, to the children's good, as long as they should need to be under it." *Second Treatise*, § 63. And again: "Thus we are born free, as we are born rational; not that we have actually the exercise of either; age, that brings one, brings with it the other too." *Second Treatise*, § 61.

<sup>3</sup> "And that all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation: for the law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody that in the state of nature had a power to execute that law, and thereby preserve the innocent, and restrain offenders: And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do." *Second Treatise*, § 7.

<sup>4</sup> "Whenever, therefore, any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a political or civil society. And this is done, wherever any number of men, in the state of nature, enter into society to make one people, one body politic, under one supreme government; or else when any one joins himself to, and incorporates with any government already made: for hereby he authorizes the society, or, which is all one, the legislative thereof, to make laws for him, as the public good of the society shall require; to the execution whereof, his own assistance (as to his own de-

This result was effected by "compact,"<sup>1</sup> from which arose obligations on the part of the government, as well as the governed, to respect the chief object and end of civil society, to wit, the security of the individual in his life, liberty, and property, and that happiness that springs from the free enjoyment of these. In other words, government derived its powers directly from man, and not from God; and, of course, if government was established by consent, it could, when occasion demanded, be altered or abolished by that consent which created it. Locke does not say, that this consent is necessarily expressly given; it may be given by implication;<sup>2</sup> and the principle, as such, is as consistent with a

crees) is due: And this puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries that may happen to any member of the commonwealth; which judge is the legislative or magistrate appointed by it. And wherever there are any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of nature." Second Treatise, § 89.

<sup>1</sup> "Men being, as has been said, by nature all *free, equal, and independent*, no one can be put out of his estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left, as they were, in the liberty of the state of nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest." Second Treatise, § 95. Again: "Whosoever, therefore, out of a state of nature unite into a community, must be understood to give up all the power necessary to the ends for which they unite into society, to the majority of the community, unless they expressly agreed in any number greater than the majority. And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be between the individuals that enter into, or make up a commonwealth. And thus that which begins and actually constitutes any political society, is nothing but the consent of any number of freemen capable of a majority, to unite and incorporate into such a society. And this is that, and that only, which did or could give beginning to any lawful government in the world." *Ib.* § 99.

<sup>2</sup> "Every man being, as has been showed, naturally free, and nothing being able to put him into subjection to any earthly power, but only his own consent; it is to be considered, what shall be understood to be a sufficient declaration of a man's consent to make him subject to the laws of any government. There is a common distinction of *an express* and a *tacit consent*, which will concern our present case. Nobody doubts but an express consent of any man, entering into any society, makes him a perfect member of that society, a subject of that government. The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds, — *i. e.*, how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all. And to this I say, that every man, that hath any possessions, or enjoyment of *any part of the dominions* of any government, doth thereby give his tacit



monarchy, or an oligarchy, as it is with a republic.<sup>1</sup> The point that Locke makes, is, that kings do not have an imprescriptible right to their thrones, but that all government rests ultimately upon the will of the people, and that they, for adequate cause, when they so choose, can change it, or do away with it altogether. That is to say, there is somewhere an ultimate right of revolution.<sup>2</sup>

This postulate it was, and this principally, wherewith the Declaration had to deal, and not the institution of government. What form that was to take, the Congress had not the authority to de-

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consent, and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it, whether this his possession be of *land, to him and his heirs for ever*, or a *lodging only for a week*; or whether it be *barely travelling freely on the highway*; and, in effect, it reaches as far as the *very being of any one within the territories* of that government." Second Treatise, § 119.

<sup>1</sup> "The majority having, as has been showed, upon men's first uniting into society, the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time, and executing those laws by officers of their own appointing; and then the form of the government is a perfect democracy: or else may put the power of making laws into the hands of a few select men, and their heirs or successors; and then it is an oligarchy: or else into the hands of one man, and then it is a monarchy: if to him and his heirs, it is an hereditary monarchy: if to him only for life, but upon his death the power only of nominating a successor to return to them, an elective monarchy. And so accordingly of these the community may make compounded and mixed forms of government as they think good. And if the legislative power be at first given by the majority to one or more persons only for their lives, or any limited time, and then the supreme power to revert to them again; when it is so reverted, the community may dispose of it again anew into what hands they please, and so constitute a new form of government: for the form of government depending upon the placing the supreme power, which is the legislative (it being impossible to conceive that an inferior power should prescribe to a superior, or any but the supreme make laws), according as the power of making laws is placed, such is the form of the commonwealth." Second Treatise, § 132.

<sup>2</sup> "221. There is, therefore, secondly, another way, whereby governments are dissolved, and that is, when the legislative, or the prince, either of them, act contrary to their trust. First, the legislative acts against the trust reposed in them, when they endeavor to invade the property of the subject, and to make themselves, or any part of the community, masters, or arbitrary disposers of the lives, liberties, or fortunes of the people. 222. The reasons why men enter into society is the preservation of their property; and the end why they choose and authorize a legislative is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society: to limit the power, and moderate the dominion, of every part and member of the society: for since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence." Second Treatise, § 221, § 222.

termine, but, at most, a power of suggestion, or recommendation. The people of the several States, were to say, and they, of course, would decide, in the manner suitable to their habits and prejudices as English freemen, and in keeping with the necessities and requirements of the case as they found them. These of themselves, forbade a monarchy, or an aristocracy, but all such issues were to be of a later determination. Matters of forms of government, and systems of suffrage and representation, were not now involved. The question then and there was one purely of political dominion. Was a revolution justifiable? Even this question would not have arisen, if the Parliament and King had confined themselves to imperial affairs, and not attempted, contrary to precedent, to meddle with the internal concerns of the Colonies.

## XVII.

Here, then, at last, is the solution. It removes the inconsistency, which always seems so baffling, when we contrast what the fathers said with what they did. It takes nothing from the glory of the Declaration, or the fame of the great men who framed it. It leaves these intact. But it does make the Declaration what it was, — the justification of the Revolution, — the right of a people to revolt against oppression, — and yet, at the same time, furnishes no basis for the charge against the fathers of inconsistency, or self-stultification. These men were largely men of the English race, and they had the traits of character that have given that race predominance in the world. They built on facts, and proceeded one step at a time, looking before, and around as well as above them. They had no love of failure, or intangible ideals, or disorder, or confusion. All their acts bear out this judgment of them. When they gave the Declaration to the world, they gave it as the pledge of their faith, and meant by it, not the propaganda of anarchy, or the demolition of civil society, but the foundation of government, upon the basis of law and justice, with freedom as broad and full as the dictates of prudence and sagacity suggested, or was compatible with the sovereign principle, never to be overlooked, that that government is best, which, not in purpose only, but in fact, brings the greatest good to the greatest number.<sup>1</sup>

*William F. Dana.*

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<sup>1</sup> See an interesting letter of John Adams to James Sullivan, May 26, 1776, discouraging the latter from raising the question of suffrage in Massachusetts at the time of the



discussion of the form of the State Constitution. Also the Virginia Bill of Rights, cited above: "Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community. Of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration." And also the Declaration of Independence, which seems to hint at a like doctrine: "*To secure these Rights* [Life, Liberty, and the pursuit of Happiness], governments are instituted among men," etc. And again: "Whenever, etc., . . . it is the right of the people, etc., . . . to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem *most likely to effect their safety and happiness.*"

## BENTHAM AND THE CODIFIERS.

IN the same year in which our Declaration of Independence, written by a disciple of French thought, was adopted by the representatives of the colonies, there was published anonymously in London a pamphlet entitled "A Fragment on Government," or, as it has been called, "A Comment on the Commentaries." It attracted extraordinary attention and was attributed to the most eminent lawyers and statesmen of the time, as Lord Mansfield, Lord Camden, or Mr. Dunning, later Lord Ashburton. Its real author was Jeremy Bentham, a young barrister, the son of a prosperous attorney, and it was the beginning, not of official or financial advancement, but of a great fame and a great influence.

The pamphlet in question was in the nature of a declaration of independence of professional tradition, and took the form of a severe criticism on the Commentaries of Blackstone, to which, when delivered as lectures to undergraduates at Oxford by their courtly compiler, Bentham, a youth, had listened with a rebel heart. This famous brochure is often spoken of as "the beginning of modern English legal criticism and reform." Of course there are no beginnings and no endings to such large matters, and this radical utterance was only one of many phenomena attending a world-wide movement, of which the French Revolution was the most convulsive and the American Revolution the most sustained and successful incident. Bentham has been deemed closer to the French Encyclopedists than to any English school of writers, and he received and accepted French citizenship, which was conferred on him by the national assembly, on the motion of Brissot, in 1792.

His little book was hailed as, and has remained, a living force in liberalism, opposing itself to the conservative spirit which has always so strongly marked the English bar, and which Bentham freely attributed to the lowest forms of self-interest, saying, "It is as impossible for a lawyer to wish men out of litigation as for a physician to wish them in health."<sup>1</sup>

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<sup>1</sup> J. S. Mill, with more just discrimination, has attributed this conservatism "in part at least, to the extreme difficulty which a mind conversant only with one set of securities feels in conceiving that society can possibly be held together by any other."



In the preface to Bentham's collected works, edited by Sir J. Bowring and published at Edinburgh in 1838, it is pointed out that "the circumstance that seems to have given the first impulse to the inquiries which engrossed his future life was the dispute between Great Britain and her colonies, which, during his law studentship was the universal topic of conversation;" so we of this country find a certain connection between the revolt of the philosopher and of the colonies, and follow with especial interest the results of the new teaching.

Bentham found, after some vacillation, in Hume's essays an unassailable central principle, the principle of utility as a test of moral precepts and legislation, looking to their tendency to promote the greatest possible happiness of the greatest possible number. To this test he adhered, and he applied it with great boldness, and, it may be often said, eccentricity, to all departments of morals, law, and government until his death, in 1832, at the great age of eighty-four years.

Lord Loughborough declared the principle dangerous, but forty-six years after he had first in print maintained it, Bentham noted that Loughborough's remark was shrewd and strictly true, as to the sinister interests of such a functionary, since in a government modelled on these principles, his Lordship could not have been "attorney general with £15,000 a year nor chancellor with a peerage, with a veto upon all justice, with £25,000 a year, and with five hundred sinecures at his disposal."

Bentham was not merely critical but constructive as well. He did not confine himself to laying down principles, but soon sought to furnish minutely formulated codes of law and procedure according with these principles, not only for his own, but for all countries whether he had any knowledge of their languages, customs, necessities, history, and feelings or not. Law, like tinned roast beef, he thought susceptible of export without deterioration and fit for consumption in any clime. "Laws need not be of the wild and spontaneous growth of the country to which they are given," he wrote; "prejudice and the blindest custom must be humored, but they need not be the sole arbiters and guides." "Legislators, who, having freed themselves from the shackles of authority, have learned to soar above the mists of prejudice, know as well how to make laws for one country as for another," — though he admits they required some data as to the circumstances of those for whom they deal.

Montesquieu had expressed the opposite belief, saying "that it is very improbable that the laws of one nation can ever be suited to the wants of another nation;" but Bentham contended that for drafting codes foreigners were preferable as more unprejudiced.

Of this sort of universal philosophical codification for which Bentham labored so long and corresponded so widely, the Hon. Lord McLaren has lately very justly said, "This type of code need not be further considered. No state which has grown up under a reasonably good legal system would agree to abandon its native institutions and accept a system of laws devised by philosophers;" and again, "A philosophical code may, like a new constitution be made in the time spent in writing it: in an age of shorthand and typewriting machines, this time need not be considered."<sup>1</sup>

It may be mentioned in passing that a constitution prepared by eminent lawyers, after a comparative study of existing constitutions, would hardly seem to share the objections indicated. Such a draft constitution, drawn at the enlightened request of Mr. Henry Villard by a number of distinguished legal scholars and practitioners, among them Professor Thayer of Harvard Law School and Mr. Beeman of New York, was offered to Montana, on its becoming a State, but its provisions were only in part adopted.

Sitting at his Hermitage in Queen's Square Place, Westminster, watching the politics of the world, Bentham, or "the Hermit," as he loved to call himself, did not hesitate to address, by post or the public press, potentates or powers, wherever circumstances seemed to make it probable that a change of law was contemplated or possible, and to offer his services to advise on any measure in discussion or to furnish a complete code. So he addressed Alexander I., the Emperor of all the Russias, the people of Spain, Simon Snyder, Governor of Pennsylvania, his fellow-citizens of France, "James Madison, then President of the Congress of the American United States," Mehemet Ali, Albert Gallatin, Prince Adam Czartoriski of Poland, and in a circular communication, "the respective governors of the American United States," and in a series of letters, "The Citizens of the several American United States." He even proposed that, as we were not the only United States of America, and as the name "The Anglo-American United States" was a circumlocution, we should rename our country "Washingtonia,"<sup>2</sup> and advised us to "shut our ports against the common law as" we "would against the plague."<sup>3</sup>

<sup>1</sup> 9 Juridical Rev. 1-3

<sup>2</sup> Vol. 8, p. 569.

<sup>3</sup> Vol. 3, p. 304.



Sir Henry Maine has since taught that many of the earliest ideas of man are reflected in ancient law, and that from their study can be traced "the steady progress of mankind from an age of formalities and ceremonies to an era of simplicity and symmetrical development." The fact that human laws and morals are as much the result of a "steady progress" of development as human bodies was not dreamt of in Bentham's philosophy, and this seems its capital defect.

He regarded right and justice as abstractions having their unchanging form as much as mineral crystals, the same for all times and all men, and that laws should be shaped accordingly. And yet, in rather an amusing way, his offers to amend the law of other nations were largely attacks upon and campaigns against the defects of the law in his own country.

Comparatively recently there has been completed a most instructive examination of his influence upon the affairs of a foreign nation whose legislation he earnestly sought to dominate, which seems to throw light upon the fate of most, if not all, of the direct attempts of the sage to be a lawgiver to the nations. In an extended discourse on "The Influence of Bentham upon Lawyers and Politicians in Spain," delivered by Don Luis Silvela on being received into the Spanish Royal Academy of Moral and Political Science in 1894, Don Luis finds, from an examination of the records of the Cortes and the history of his country, little, if any, recognition of the influence of the London Hermit, nor can he find that Bentham's letters to the Spanish people were either preserved by the Conde de Toreno, President of the Cortes, to whom they were sent in response to a letter from him asking Bentham's advice, or ever translated into the Spanish tongue. The philosopher seems to have addressed the Castilian with discourteous reflections on his motives, and to have been answered civilly but coldly, and thereafter ignored.

His discussion of the proposed upper chamber in the Spanish government seems to have been a repetition of his objections to the English House of Lords, and written without investigation or knowledge of Spanish institutions or sentiment. Bentham later published these letters in England, and his letters to Madrid belong, as Señor Silvela sharply observes, "to the homeward mail," and seem to have been part of his war on the house of peers of his own country.<sup>1</sup>

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<sup>1</sup> See Spanish view of "Bentham's Spanish Influence," by Courtney Kenney, 11 L. Q. R. p. 48. However, it should not be overlooked that the Patriotic Society of

In Portugal the Cortes, on receipt of Bentham's gift of his works, ordered them translated at the public cost, and his letter was read aloud in the legislative halls. The proposed constitution was adopted freed from the defects he had pointed out, and almost at once collapsed.

But while his codes were not adopted, it is quite certain that his ideas, or a great many of them, were assimilated, if we may use a word which seems most fit. It has been freely said that hard'y an important reform in law has been effected within this century which Bentham had not foreshadowed and early advocated.

Thus he devoted five large volumes to the "Rationale of Judicial Evidence," and among other points strongly objected to the exclusion of witnesses on the ground of interest, urging that interest might affect the credibility but not the admissibility of evidence. That view has, in the main, prevailed and been established in the law of both England and America; and the recent enactment, long familiar to us, which in England permits one accused of crime to testify in his own behalf, and which has so divided and excited the English bench and bar, is only a further extension of Bentham's ideas.

He declared against exclusion of testimony on the ground of religious opinions, and the contention has been so successful that the constitutions of many of our States (as my own State of Wisconsin) enact as fundamental law that "no person shall be rendered incompetent to give evidence in any court of law or equity in consequence of his opinions on the subject of religion."

He advocated the registration of real property, which is now a common practice. He assailed laws against usury, and England has repealed and this country greatly moderated them. He advocated receiving the testimony of witnesses previously convicted of crime, and it is now received in both England and America. He vigorously opposed "death punishment," and the number of crimes punished capitally has been enormously reduced in the whole civilized world, and most notably in England through reforms introduced by Sir Samuel Romilly, the attached friend and disciple of Bentham. In our own country the death penalty has been wholly

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"the Friends of the Constitution" in Spain made Bentham an honorary associate in 1820; that Don Augustin Arguelles, Minister of the Interior, requested his opinion as to trial by jury, the prison committee of the Cortes reported in favor of his Panopticon principle for the prisons of the kingdom in the same year, and at least two deputies wrote him for aid in shaping the laws of Spain.



abandoned in at least four of our States (in my own State of Wisconsin it has been unknown for forty-six years and with no detriment to justice). In several of the continental nations of Europe it has been wholly abolished, as in Holland, Portugal, and Italy; and so rarely inflicted as to be almost abolished in others, as Belgium, Bavaria, Sweden, and Denmark; and in the great empire of Russia it is abolished except as a penalty for certain high political offences.

He advocated education to be provided for and required by the government, and that duty has been taken up by many of our States, and is more and more recognized in England.

He advocated freedom in devising and bequeathing property, and our laws give the widest liberty, and the laws of England have constantly tended in the same direction. He advocated voting by ballot, long now in use in this country and for some years in England. He advocated a system of public prosecutors, which we have. Burton printed a long list of reforms, first advanced by Bentham and later adopted by legislation; and it might now be greatly extended, and I am sure that ten years from now it could be still more extended.

In fact, the majority of men, even of the higher intelligence, have so constantly been wrong when they have been opposed to Bentham, and time has justified his principles so often, that we may well doubt our conclusions, not seldom the result of mere inertia, when they conflict with his teachings.

Sir J. Fitz J. Stephen in his history of Criminal Law concludes that Bentham's writings "have had a degree of practical influence upon the legislation of his own and various other countries comparable only to those of Adam Smith and his successors upon commerce."

Over and above all the several amendments of law which he pressed for, Bentham vigorously demanded a complete code of laws, clear, simple, shaped on the principle of utility, which he had advocated, and all comprehensive. In his circular of 1817 to the citizens of the United States, whom he addressed as "Friends and fellow-men," he says: "Accept my services, — no man of tolerably liberal education but shall, if he pleases, know — and know without effort — much more of law than, at the end of the longest course of the intensest efforts, it is possible for the ablest lawyer to know at present. No man, be he even without education in other respects, — no man but, in his leisure hours, so he can but read, — may, if so it please him, know more of law than the most knowing among lawyers

can possibly know at the present." But notwithstanding, or, as he would have intimated, because of these high hopes held out, his correspondence with Governor Plumer of New Hampshire, with Governor Snyder of Pennsylvania, with Governor Nicolas of Virginia, with President Madison, all came to naught, and his splendid offers ended in civil expressions of regret from those he had addressed.

When Romilly visited Bentham at Ford Abbey, where he was living *en grand seigneur*, he found him, as he had found him for thirty years, giving six hours daily to writing on laws and legislation and composing codes, and spending the rest of his time in reading and exercise, or, as he himself said, "taking his anti-jentacular and post-prandial walks to prepare himself for his tasks of codification." Bentham wrote in his last days that he was codifying away "like any old dragon."

Yet, with curious disregard of a great contemporaneous code, he could write the Emperor of Russia in 1815 of the Code Napoleon, "With what degree of skill it is made up, I have never yet seen any use of inquiring."

It is perhaps not possible to trace to his hand any legislative act in this or any country.

It was long before Bentham that Pepys set down in his Diary, "Mr. Prin, till company come, did discourse with me a good while about the laws of England, telling me the main faults in them; and, among others, their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort [*sic*], and as he lives and Parliaments come, get them put into laws and the other statutes repealed, and then it will be a short work to know the law." It cannot yet be said to be a short work to know the law, notwithstanding both Mr. Prin and Jeremy Bentham.

Mr. Leslie Stephen, in his life of his brother, Sir James, has pointed out that "with parliamentary reform an era of rapid and far-reaching changes set in, though Bentham died on the eve of entering the land of promise." That James Mill, on whom the mantle of Bentham fell, held a leading position in the India House, and when the charter of his company was renewed in 1833, one year after his master's death, his evidence largely shaped the alterations made. By its terms, one of the four members of the Governor-General's Council was to be appointed from persons not servants of the company, and was to attend only at meetings for framing laws. Macaulay was the first to hold the appointment,



and drafted the Indian Penal Code. Mr. Cameron, one of his assistants, was an earnest disciple of Bentham. It was not passed until 1860, after it had been revised by Sir Barnes Peacock. This code was a triumph for Benthamites, and after twenty-one years' trial won the highest commendation from Stephen in his history of Criminal Law.

It has served as a model for all the later Indian codes. It was a part of a systematic scheme of codifying since carried out. Sir J. Fitz J. Stephen, a valiant Benthamite till death, became legal member of the Indian Council in 1869, and was successor to Sir Henry Maine. He remained until 1872, devoting himself largely to drafting or revising codes for India on various subjects, as contracts, wills, and evidence, which have won great commendation from eminent Indian lawyers, though with some criticisms as to details. On his return to England he was employed by the government to prepare a draft evidence bill, which he finished in February, 1873; but the government went out in March, and the bill, therefore, failed of passage. He, however, transported the Indian Code ideas and methods into his vigorous agitations for and attempts at codifying in England, interesting many high officials in the subject. Now, as Sir W. H. Rattigan has pointed out, India has her Penal Code, a contract act, bills of exchange act, limitation act, registration act, evidence act, easement act, and others, and drafts for yet further codifying acts have been prepared.

Mr. F. E. Montague has pointed out the debt of the Anglo-Indian Code to Bentham, and suggested that it may play a part in the East hardly less momentous than did Justinian's recension of Roman law in the West, powerfully controlling the Oriental races while English Empire continues, and, like the Roman law, surviving though the authority that imposed it decline and fall.

The Indian codes have vigorously reacted on English legislation, both as models and through eminent Englishmen who, like Stephen, return from codifying in India to shape legislation in England. No one can read the reports of modern English courts without discovering that Great Britain is now in considerable part governed by an elaborate system of parliamentary laws, as the Bills of Exchange Act of 1882, and perhaps the Judicature Act, adopted within the present generation, prepared by commissions or eminent legal scholars, aiming to codify, elucidate, define, and modernize the law on their several subjects.

David Dudley Field, in his arguments for codification before the

New York legislature, was able to quote among other passages the following from Sir J. Fitz James Stephen as to the Indian codes: —

“You will naturally ask how this process of codification has succeeded? To this question I can answer that it has succeeded to a degree that no one could have anticipated, and the proofs of the fact are, in my mind, quite conclusive. One is the avidity with which the whole subject is studied, both by the English and by the native students in the universities.

“The knowledge which every civilian you meet in India has of the Penal Code and the two Procedure Codes is perfectly surprising to the English lawyer. People who in England would have a slight, indefinite, rule of thumb knowledge of criminal law, a knowledge which would guide them to the right book in a library, know the Penal Code by heart, and talk about the minutest details of its provisions with keen interest. I have been repeatedly informed that the law is the subject which the native students delight in at the universities, and that the influence, as a mere instrument of education of the codifying acts, can hardly be exaggerated. I have read in native newspapers detailed criticisms on the Evidence act, for instance, which proved that the writer must have studied it as any other literary work of interest might have been studied. . . . I once had occasion to consult a military officer upon certain measures connected with habitual criminals. He was a man whose life was passed in the saddle, who had hunted down thugs and dacoits as if they were game. Upon some remark which I made he pulled out of his pocket a little code of Criminal Procedure, bound like a memorandum-book, turned to the precise section which related to the matter in hand, and pointed out the way in which it worked with perfect precision. It is one of the many odd sights of Calcutta to see native policemen learning by heart the parts of the police act which concern them. The sergeant shouts it out phrase by phrase, and his squad obediently repeat it after him till they know it by heart. The only thing which prevents English speaking people from seeing that the law is really one of the most interesting and instructive studies in the world is that English lawyers have thrown it into a shape which can only be described as studiously repulsive.”

The “Code Frederic,” or “Landrecht,” of Prussia, promulgated in 1751 under the authority of Frederick the Great, is commonly classed as the first of the modern codes of Europe. It had among its chief objects to unite the discordant peoples of his newly extended kingdom by common laws, and (a proper object for a military despot) to destroy the power of the lawyers, whom he berates in the introduction. This, of course, antedated Bentham’s labors.



The next is the "Code Napoleon," or as it is called under the Republic, "Code Civil," promulgated under the authority of the great Emperor between the years 1804 and 1810, and designed to replace the extreme confusion of the "*droit écrit et droit coutume*" of France, where Voltaire had said, with bitter truth, that a traveller had to change laws as often as horses.

Savigny complained of the ignorance and haste with which it was completed, and Austin follows him and points out its defects in definition, but it has continued to dominate France long after the imperial house has fallen, and, having been imposed by conquest or its equivalent, has been adopted and retained in Italy, Holland, Belgium, the Rhenish Provinces, Poland, and Switzerland, and been a model for other countries as Greece. Napoleon's boast, "I shall go down to posterity with my code in my hand," has been justified.

Bentham with just pride pointed out in a letter to the Emperor of Russia that he alone of living men was quoted in the introduction to this code, and his name and doctrines were familiar and powerful in France long before this great work was accomplished.

It was upon this "Code Civil" that M. Appert, late Professor of Law at the University of Tokio, says the first Japanese Code was shaped, mainly owing to the association of the French Code with the impressive name of Napoleon.

Later codifications there have looked to the draft code of the German Empire also, and a code of civil procedure has been prepared by an English barrister.

Austria and Spain have long had codes shaped upon the civil law, but the great name and authority of Savigny, Sir W. H. Rattigan has pointed out, retarded codification in Germany until recently, but a code for the German Empire, after many years of preparation, was promulgated in 1898.

Quebec has had a "Code Civil" since 1865, and Canada adopted a criminal code in 1892. This is not meant as a comprehensive list of codes which is beyond the scope of this article, but as an intimation of the wide recognition of the principle of codification and the steady growth of such recognition.

Bentham has not lacked followers in this country, and one of the most potent in results as well as one of the earliest in time was Edward Livingston. He was a younger brother of Chancellor Livingston, who administered the inaugural oath to Washington. He was himself for six years member of the National House of Rep-

representatives from New York, and later held simultaneously the places of mayor of New York and United States District Attorney. Owing to a default on his part as to a large sum of money in his hands as such district attorney, occasioned largely by the dishonesty of a trusted clerk, he resigned at once both offices and removed to the newly acquired territory of Louisiana to endeavor to retrieve his fallen fortune, and there, immediately, took the leadership of the New Orleans bar. While in Congress, having already fallen under the influence of Bentham through Dumont's French redaction of some part of his works, he had sought to do away with the penalty of death for federal offences, but without avail. He found the laws of Louisiana in the direst confusion, consisting of Spanish law overlaid by French law, and then by English common law, as the result of the possession of that territory by the various powers. He first drafted a brief code of practice which was adopted by the legislature, and later took the chief part upon a commission appointed to draft a civil code for the State. This too was, without material alteration, enacted and became law.

In February, 1821, he was chosen by joint ballot of the general assembly of Louisiana to revise the criminal laws of the State. He was fifty-seven years old, and familiar with English, Roman, French, and Spanish law. He wrote at once to the governors and men of distinction in every State, to the principal foreign ministers and many publicists in foreign countries, for practical information. After three years of labor he completed a final draft for the printer, but it was accidentally consumed by fire in his house in New York the same night. His volumes of Bentham's works were burned at the same time, and he could not find them in any bookstore or library in New York. He wrote at once to his friend Du Ponceau, at Philadelphia, to "buy, borrow, or beg" them for him. Du Ponceau appears to have got them for him and is thanked for his trouble. At sixty years of age he began the work anew, completing it two years later. He had substantially abandoned his Southern residence and resumed his domicile in New York at this time, where much of this draft was prepared. Mr. Livingston, beginning in 1822, represented Louisiana three terms in the lower house of Congress and two years in the Senate. During this time he and Bentham corresponded and exchanged their respective works. He left the Senate to serve as Secretary of State of the United States, and Minister to France.

Louisiana, alienated by his long absence, never adopted this crim-



inal code, but it was published in both our own country and Europe, and at once raised its author's fame as a publicist to the highest rank. Founded on the French Code it was marked throughout by the direct influence of Bentham, to whom he long after wrote, "Although strongly impressed with the defects of our actual penal law, yet the perusal of your works first gave method to my ideas and taught me to consider legislation as a science governed by certain principles applicable to all its branches." The code was welcomed the world over. Letters of eulogy came from President Jefferson, the Emperor of Russia, and the King of Sweden. Victor Hugo wrote, "You will be numbered among the men of this age who have deserved most and best of mankind;" and Kent said he had done more than any legislator of the age. The King of the Netherlands sent him a gold medal, and the government of Guatemala caused his Code of Reform and Prison Discipline to be translated and adopted word for word. Bentham's works in their French dress had had an immense sale in Spanish America, and an important influence in forming the ideas of the founders of their republics. The unstable lot of those governments perhaps illustrates the dangers of exotic reforms.

Livingston studied clearness in his codification, and was used to read what he had prepared to persons unskilled in law and test the excellence of his composition by their ability to comprehend it. He prepared a book of definitions for all terms which he thus found difficult of understanding. Something like this system of definition is found in the later Indian and English codification. It is related, as illustrating the success of his practice code in doing away with difficulties, that a young lawyer from another State consulted him as to how long he would require to familiarize himself with the Louisiana practice. Livingston, with whom he was engaged to dine at four on the next day, replied he would promise to teach it to him before that time, and he records that he was successful in so doing. Livingston revised his penal code for federal enactment, and March 3, 1831, introduced it in the Senate. It was ordered printed for further consideration; but when the Senate again convened he was no longer a senator, and it was not further considered. He had by this time, under the will of his sister, the widow of General Montgomery, who fell at Quebec, succeeded to a fine estate upon the Hudson, and had returned to make his home there; and there he died in his seventy-second year from a sudden illness, when his strength seemed hardly abated.

It is not easy to trace the connection between these Louisiana codes and the important movement for codification having its home in New York and spreading thence, in the matter of practice and procedure at least, to a majority of the several States, though it seems obvious. The leading spirit in that movement was the late David Dudley Field, called "the greatest codifier since Bentham." I have examined the index of the three published volumes of his works, including many reports and addresses on codification, and do not find the names of either Bentham or Livingston or the Louisiana Code once there-entered.

However, on the pages themselves I find Mr. Field referring to Bentham's great work on Evidence with the highest praise, and he freely quoted from Sir J. Fitz J. Stephen, Bentham's eminent disciple.

Mr. J. Newton Fiero, whose knowledge of the subject will not be doubted, has recently declared, "The movement in favor of a clear, simple, and concise method of practice began with the criticisms of Bentham very early in the century, and resulted, first, in the adoption of the Code of Procedure in Louisiana, as drafted by Edward Livingston, and subsequently, in 1846, in the New York Code of Procedure, as drafted by David Dudley Field and adopted and continued for a period of nearly thirty years."

Mr. Field's general codes, it may be said, were adopted in California and Dakota.

Revision of the statutes, behind which codification often lurks but half concealed, is now almost universal in our several States. The commission at present revising our federal statutes has power to report changes, and the Livingston codes have commanded the attention of at least one of the members of that commission. The International Law Association, which in August last held its first meeting in this country, is seeking the codification of the Law of Nations, the most illusive and sublimated of human regulations whose authority and sanction may still be invoked as law.

Perhaps the hermit of Queen's Square Place does not wholly deserve the commendation of his great editor and disciple, Mill, that "he found the philosophy of law a chaos, he left it a science." It is certainly not yet a perfected science; but no one can trace the course of legislation in England or in the United States, or on the continent of Europe, or in those great Asian empires most directly affected by European thought, without concluding that though Bentham's formal codes were "refused and rejected of



men" and of nations, yet we may say, without flippancy or dispute, that the soul of the great utilitarian and codifier "goes marching on."

When he found death approaching he characteristically said to his attending friend, "I now feel that I am dying; our care must be to minimize the pain. Do not let any of the servants come into the room, and keep away the youths; it will be distressing to them and they can be of no service. Yet I must not be alone; you will remain with me, and you only; and then we shall have reduced the pain to the least possible amount." This was his last legislation. His body was embalmed by his own direction and presented to University College, London, where it still is, although no longer shown to the public. He was fully persuaded that his plans for prison reform were defeated because the King personally disliked him, and in consequence he wrote a volume, only a part of which has ever been printed, entitled "History of the War between Jeremy Bentham and George the Third, by one of the Belligerents." The war is over, and the grave has claimed sovereign and subject alike; but in both Great Britain and a far wider region the dominion of the sage seems to outlast the dominion of the King, and his radical but benevolent philosophy exercises a far-reaching influence.

President Madison wrote to Bentham, some eighty-three years ago (1816), declining his proposals to prepare a complete code for the United States, and in his letter said of these proposals, "Although we cannot avail ourselves of them in the mode best in itself, I do not overlook the prospect that the fruits of your labors may, in some other, not be lost to us." It is submitted that this fragmentary review of the subject indicates that they were not "lost to us" or to the world.

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ADVISORY OPINIONS OF THE JUDGES  
OF ENGLAND.

THE recent assemblage of the English judges to advise the House of Lords in the determination of the case of *Allen v. Flood* recalls a practice which in recent times has been seldom employed. It is an ancient right of the House of Lords to summon the judges at the beginning of each Parliament to be present for the purpose of assisting the House, when required, in the solution of legal questions. Although the judges continue to receive such a summons they no longer attend, save at the opening of Parliament, unless specially summoned for a particular purpose.<sup>1</sup> English judges alone are summoned. It does not appear that the Irish judges have ever been consulted; but in 1737 three of the judges of the Justiciary Court of Scotland were summoned to advise the House of Lords in the matter of the Porteous riots, and again in 1807 to give an opinion on a Scotch Judicature Bill.<sup>2</sup>

It was a common practice of the House during the eighteenth century to consult the judges, but Brown, the Parliamentary reporter of that period, simply reports their conclusions. During the first quarter of the nineteenth century Eldon and Redesdale, who performed most of the judicial functions of the House, seldom called for the views of the judges. During the period from the Common Law Procedure Act to the Judicature Act the judges were frequently consulted, and almost all the reported opinions of the judges on such occasions come within this period. Since 1876, the judges have been assembled only four times. The establishment of permanent courts of appeal seems to have led to the practical abandonment of the old practice.

In practice the attendance of the judges seems to have been subject to the same difficulties encountered in the make-up of the Court of Exchequer Chamber. Occupied with the labors of their

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<sup>1</sup> Anson, *Law & Custom of the Constitution*, pt. ii. p. 472; Todd, *Parliamentary Government in England*, ii. 853, 854.

<sup>2</sup> *Law Times*, Nov. 27, 1880, p. 53.



own courts the judges were irregular in responding.<sup>1</sup> And there is plenty of evidence in the reports that the right of the House to put questions of law to the judges without regard to the form of an appeal or to the points raised<sup>2</sup> often led the judges to regard the duty with aversion. In *McNaghten's case*,<sup>3</sup> for instance, although the questions proposed by the House were suggested by the issue raised in *McNaghten's trial* they were so abstract in form that Justice Maule requested to be excused from giving an answer. At the outset of the opinion which he finally gave, he puts the difficulties of such a method of consideration in a strong light. "I feel great difficulty," he said, "in answering the questions put by your lordships on this occasion: first, because they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; secondly, because I have heard no argument at your lordship's bar, or elsewhere on the subject of these questions, the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal cases."

The judges are called upon to advise, but the decision rests with the House alone. Lord Campbell expressed the accepted doctrine when he said in *Burdett v. Spilsbury*,<sup>4</sup> "When your lordships con-

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<sup>1</sup> Actual attendance and oral answer has always been required upon a difference of opinion, except in a few cases where a written answer was received by special permission. *Stephenson v. Higginson*, 3 H. L. 652; *Egerton v. Brownlow*, 4 H. L. 1.

Cases in which the judges gave their opinion at the hearing seem to have been rare. Often their delay was vexatious. Two or three years' consideration was not uncommon; in *Bertwhistle v. Vardell*, 2 C. & F. 571, twelve years intervened between the trial and final judgment in the House of Lords.

<sup>2</sup> *Bright v. Hatton*, 3 H. L. 345. In the matter of the Westminster Bank, 2 C. & F. 192, the judges declined to answer, on the ground that the question was "proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing acts of Parliament." *In re Islington Market Bill*, 3 C. & F. 512, the judges gave an opinion on a bill pending in Parliament. It will be remembered that the judges were called upon for their opinions on the law of libel when Fox's bill was pending in Parliament.

<sup>3</sup> 10 C. & F. 199.

<sup>4</sup> 10 C. & F. 413.

sult the Queen's judges I do not at all consider that you are bound by the opinion of the majority, or even by their unanimous opinion, unless you are perfectly satisfied with the reasons which they assign for the opinion they give."<sup>1</sup> Individual lords have taken a different view of their duty in this respect.<sup>2</sup> I have been able to find, however, only five instances in recent times in which the House has given judgment contrary to the opinion of a majority of the judges: *O'Connell v. The Queen*,<sup>3</sup> *Jeffreys v. Boosey*,<sup>4</sup> *Unwin v. Heath*,<sup>5</sup> *Hammersmith Ry. v. Brand*,<sup>6</sup> *Allen v. Flood*.<sup>7</sup>

The case of *Jeffreys v. Bocsey* concerned a question of copy-right—a question upon which there has been great conflict of authority ever since the case of *Millar v. Taylor*,<sup>8</sup> where, for the first time under Mansfield's chief justiceship, the judges of the Court of King's Bench were divided in opinion. It appeared that Bellini, a foreign musical composer, resident at that time in his own country, assigned to Ricordi, another foreigner, also resident there, according to the laws of their country, his right in a musical composition of which he was the author, and which was then un-

<sup>1</sup> So, in *Mirehouse v. Rennell*, 1 C. & F. 603, Lyndhurst moved judgment "not on the ground of the majority of the judges being of opinion in favor of that judgment, but because I think it is a sound and correct opinion."

<sup>2</sup> Lord Wynford may be taken as an exponent. In *Atty.-Gen. v. Winstanley*, 5 Bligh (N. S.), 144, he said: "My view of the case had altered before I heard the opinion of the learned judge [Baron Bayley]; but if I had remained in my former opinion I should have done as I did upon one occasion before when I had the misfortune to differ from all the learned judges, I should have advised your lordships to act upon their opinion; for it would introduce a wretched state of uncertainty in the law of the country if you were not to act upon that which is the highest authority of the law in Westminster Hall, but follow the opinions of individual Peers. Wynford acted consistently in accordance with this view. *Roake v. Denn*, 10 D. & C. 446; *Giles v. Grover*, 1 C. & F. 222; *Mirehouse v. Rennell*, 1 C. & F. 609. See, also, Lord Truro's opinion in *Emmens v. Elderton*, 4 H. L. 675. *Roake v. Deen*, 1 D. & C. 446, is a case where the Lord Chancellor and Lord Wynford, constituting the court, yielded their own judgment to the unanimous opinion of the judges. In speaking of his dissent from the majority of the judges in *O'Connell v. The Queen*, 11 C. & F. 422, Brougham stated that he had also dissented from the majority of the judges in the case of the Irish marriages because his own view was sustained by many eminent authorities. "If it had not been for that," he said, "I should on no account have set up my judgment against that of the learned judges." On the other hand, Lord Chancellor Eldon is reported to have said in rebuking the House for having received the opinion of the judges in the absence of the law lords: "I recollect a case wherein the twelve judges having given their opinions, the Lord Chancellor satisfied the House that they were all wrong." Campbell, *Lives of the Chancellors*, ix. 353.

<sup>3</sup> 11 Cl. & F. 232.

<sup>4</sup> 4 H. L. 815.

<sup>5</sup> 5 H. L. 513.

<sup>6</sup> 4 E. & I. App. 171.

<sup>7</sup> [1898] A. C. 1.

<sup>8</sup> 4 Burr. 2303.



published. The assignee brought the composition to England, and before publication assigned it, according to the forms required by English law, to an Englishman named Boosey, by whom it was first published in England. In the House of Lords Lord Chancellor Cranworth, whose charge was in question, Brougham, and St. Leonards decided that the foreign assignee, Bellini, had not by the law of England an assignable copyright in the musical composition, adopting the view of Alderson, Parke, Pollock, and Jervis,<sup>1</sup> as opposed to the opinion of Crompton, Williams, Erle, Wightman, Maule, and Coleridge. The opinions of Erle and Brougham constitute an able exposition of the case for and against the existence of copyright under the common law.

Hammersmith Ry. *v.* Brand involved a principle which, in all its ramifications, has commanded much attention in the courts on both sides of the Atlantic; namely, that an action will not lie for damage necessarily resulting from the exercise of the powers of an act of Parliament in a case for which no provision as to compensation or liability is made. Willes, Bramwell, Lush, Keating, and Pigott were of the opinion that there was a right to compensation; Blackburn *contra*. Lords Chelmsford and Colonsay adopted Blackburn's view, Lord Chancellor Cairns dissenting.

In O'Connell's case the main point in dispute was the validity of a general judgment where some of the counts are bad. It was maintained that the practice to this effect did not apply to writs of error, but was confined to motions in arrest of judgment. Seven judges were against the objection; two in its favor. Denman, Cottenham, and Campbell held that the conviction could not stand. Lyndhurst and Brougham dissented.

An examination of the cases, in which the judges have been called upon for advice, shows plainly the haphazard way in which the law has been developed. One would expect to find such elaborate discussion bestowed only upon cases involving fundamental principles of vital importance. But such has not been the case. The House of Lords reports from 1827 to 1899 contain one hundred and twenty-five cases in which the judges have assisted. Of this number there are hardly more than a score which are in any sense landmarks in legal history. Fully one third of the number deal with the construction of particular documents; and of the cases

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<sup>1</sup> See, also, *Reade v. Conquest*, 9 C. B. (N. S.) 755. The case of *Wheaton v. Peters*, 8 Peters, 591, settled the same doctrine in the United States.

involving the construction of statutes not more than half a dozen relate to statutes of general importance. Indeed, aside from the relative unimportance of most of these cases, it is difficult to understand upon what principle the House acted in determining when the judges should be assembled. For in twenty-four cases there was no difference of opinion from the trial court to the House of Lords: and in fifty-eight cases the assembled judges were unanimous in opinion. Of course, in addition to cases of first importance, the procedure was often properly applied in the final settlement of questions which, although relatively unimportant, had been much debated: <sup>1</sup> cases in which, as Lord Brougham said, "it is of much more importance that the question should be settled than it is in which way it shall be settled."<sup>2</sup>

There has been a remarkable consensus of opinion among the law lords. In only eleven cases was there a division of opinion in the House: *Birtwhistle v. Vardell*,<sup>3</sup> *Garland v. Carlisle*,<sup>4</sup> *The Queen v. Millis*,<sup>5</sup> *O'Connell v. The Queen*,<sup>6</sup> *Grey v. Friar*,<sup>7</sup> *Jeffries v. Alexander*,<sup>8</sup> *Fitzmaurice v. Bayley*,<sup>9</sup> *Peck v. North Staffordshire Ry. Co.*,<sup>10</sup> *Hammersmith Ry. v. Brand*,<sup>11</sup> *Atty.-Gen. v. Dakin*,<sup>12</sup> *Allen v. Flood*.<sup>13</sup>

Of these cases probably the most famous is *The Queen v. Millis*, concerning the validity of the Irish marriages. The Irish Court of King's Bench was equally divided as to the validity of a marriage at which no regular clergyman had been present. In the House of Lords Chief Justice Tindal delivered the unanimous opinion of the judges against the validity of the marriage. The lords were equally divided in opinion, Brougham, Denman, and Campbell agreeing with the judges, while Lyndhurst, Cottenham, and Abinger took the contrary view. Owing to the form in which the question came before the House the result of the division was that the marriage was held to be void. By the canon law, which is the basis of the marriage law of Christendom, a contract *per verba de praesenti* or *per verba de futuro subsequente copulâ* was sufficient alone to constitute a valid marriage. But marriage, although based upon the contract of the

<sup>1</sup> Such as *Irving v. Manning*, 1 H. L. 303, and *Garland v. Carlisle*, 4 C. & F. 692.

<sup>2</sup> 1 C. & F. 223.

<sup>3</sup> 2 C. & F. 511, 7 C. & F. 895.

<sup>5</sup> 10 C. & F. 533.

<sup>7</sup> 4 H. L. 565.

<sup>9</sup> 9 H. L. 78.

<sup>11</sup> 4 E. & I. App. 182.

<sup>13</sup> [1898] A. C. 1.

<sup>4</sup> 4 C. & F. 692.

<sup>6</sup> 11 C. & F. 232.

<sup>8</sup> 8 H. L. 594.

<sup>10</sup> 10 H. L. 473.

<sup>12</sup> 4 E. & I. App. 338.



parties, is rather a status arising out of contract, to which each country is entitled to attach its own conditions.<sup>1</sup> According to the English doctrine the common law required that the marriage should be celebrated in the presence of a priest in holy orders.<sup>2</sup>

*Peek v. No. Staffordshire Ry. Co.* lays down a familiar doctrine. The point involved in that case depended almost entirely upon the construction of the Railway & Canal Traffic Act of 1854, which provided that no general notice given by a railway company is valid for the purpose of limiting the common law liability of the carrier, but that such liability might be limited by special contract on conditions which were just and reasonable, short of exemption from liability occasioned by the neglect of the railway company. It seems that in the negotiations between the shipper and the agent of the railway company on the subject of terms, the latter stated as a condition that the company would not be responsible for damage to goods shipped unless their value was declared and they were insured at a certain rate. After some delay the agent received a note requesting that the goods might be shipped forthwith "not insured." The goods were shipped and suffered damage. In the House of Lords Westbury, Cranworth, and Wensleydale, following the opinion of Blackburn, Crompton, Williams, and Cockburn, as opposed to Willes, Martin, and Pollock, held that the condition was unreasonable; that there was no special contract signed by the parties within the meaning of the statute, and that the rights of the parties were therefore to be determined by the common law. Lord Chelmsford dissented.

The judges of the Exchequer Chamber had been equally divided, in *Atty.-Gen. v. Dakin*, as to whether a sheriff who had levied a *f. fa.* in some of the apartments of Hampton Court Palace was liable to an information for intrusion. The House decided (by Chelmsford and Colonsay, Hatherley dissenting) that this palace, although a royal palace, was not a royal residence, and therefore not exempt from execution within it of civil process.

The judges, on the other hand, appear to have been much more tenacious of individual opinions.<sup>3</sup> They differed in opinion in ex-

<sup>1</sup> *Hannen, J.*, in *Sattomayor v. De Barros*, 47 L. J. P. 23.

<sup>2</sup> See the learned opinion by Willes, J., to the contrary in *Beamish v. Beamish*, 9 H. L. 274. This is in accordance with the American doctrine.

<sup>3</sup> *Lucas v. Nockells*, 1 C. & F. 450, was originally tried by Tenterden, and his judgment was confirmed by the eight judges constituting the Exchequer Chamber. In the House of Lords Parke alone held out against the opinion of twelve colleagues. In *Beckham v. Drake*, 2 H. L. 578, Parke changed his mind.

actly one half of the cases in which they were consulted. In seven of these cases they were equally divided: *Wright v. Tatham*,<sup>1</sup> *Stephenson v. Higginson*,<sup>2</sup> *Gosling v. Veley*,<sup>3</sup> *Mayor of Drogheda v. Holmes*,<sup>4</sup> *Hooper v. Lane*,<sup>5</sup> *Cox v. Hickman*,<sup>6</sup> *Atty.-Gen. v. Dakin*.<sup>7</sup>

In the case of the *Mayor of Drogheda v. Holmes*, all the judges of England were opposed to all the Irish judges as to the validity of a lease by a municipal corporation.

*Cox v. Hickman* is a most important case on partnership. The creditors of an insolvent manufacturer agreed to carry on the business of the debtor, and to apply the net profits to the payment of the debts. The judges of the Exchequer Chamber were equally divided in opinion as to whether this constituted a partnership among the creditors. The House held that it did not, following the opinion of Channell, Wightman, and Pollock; Blackburn, Crompton, and Williams, *contra*. This case put an end to two notions, — first, that third persons may hold to the liability of partners those who in fact are not partners merely because some other relation exists between them; second, that participation in the profits of a business is a conclusive test of partnership. As Lord Cranworth said: —

"It is often said that the test, or one of the tests, whether a person not ostensibly a partner is, nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general, a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting in his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other; namely, the fact that the trade has been carried on on his behalf; *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred and under whose management the profits have been made."

<sup>1</sup> 5 C. & F. 670.

<sup>4</sup> 5 H. L. 460.

<sup>7</sup> 4 E. & I. App. 346.

<sup>2</sup> 3 H. L. 652.

<sup>6</sup> 6 H. L. 442.

<sup>3</sup> 4 H. L. 711.

<sup>8</sup> 8 H. L. 267.



This decision does not, however, offer any alternative test of partnership; for the suggestion as to the necessity of an agency is of little assistance in a doubtful case. The agency is the result of the partnership, not *vice versa*.

Among other cases in which there was a marked difference of opinion was the famous Bridgewater will case, in which the family of Lord Brownlow was confirmed in the estate which they inherited from the Duke of Bridgewater, free from the condition that Lord Alford should obtain a step in the peerage, which was held to be void on grounds of public policy. *Giles v. Grover*,<sup>1</sup> a leading case on the law of executions, and one of the most elaborately discussed cases to be found in the reports, is also worthy of notice.

A point involved in much difficulty, upon which the authorities are irreconcilable, came before the House in the case of *Gibson v. Small*.<sup>2</sup> In a time policy of insurance effected on a vessel at sea is there an implied condition that the ship is seaworthy on the day when the policy is intended to attach? It was decided that there is no such condition; but there is much to be said on the other side of the question. It was admitted by the majority of the judges that there was an implied warranty in voyage policies; *i. e.*, that the vessel is in such a state as to be able to encounter the ordinary perils of the adventure in which the policy states it to be then engaged. Such warranties arise, first, out of the expressed state of the adventure, so that both parties are informed as to the extent and modifications of the contract. But a time policy is on the ship merely from the date stated in it for a period therein fixed. It is altogether silent as to the adventures in which the ship, during the period insured, may be engaged. How, then, is the implied warranty of seaworthiness to be known, as to its extent or modifications, from the contract itself? In a voyage policy, the date at which the implied warranty of seaworthiness is to be fulfilled is the commencement of the adventure stated in the policy. A time policy, on the other hand, is the insurance of a part of the general risk of the owner for a given period. If it is to be referred back to the time when the owner's risk commenced, the implied warranty of seaworthiness would be fulfilled if the ship was seaworthy when the owner first possessed it, for then his risk first began. But this would be absurd. The other conclusion would be to refer it to some other period without knowing where or in what

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<sup>1</sup> 1 C. & F. 72.

<sup>2</sup> 4 H. L. 352.

situation the vessel was, or how engaged at the time of effecting the insurance; and, if so, to the commencement of some unknown adventure, which would have been expressed in a voyage policy. Williams and Erle dissented. Erle was of the opinion that whether the condition was derived from the construction of the words of the instrument or from implication of law founded on the nature of the contract, time policies are subject to it as well as voyage policies. He said: —

“If the question turns on the construction of the instrument, time policies may be taken to be identical with voyage policies in all the terms except those relating to the measure of the duration of the insurance. This, in voyage policies, is measured by the motion of the ship; in time policies, by the motion of the earth. Each contract is for an indemnity, and each for a limited time; and there seems no reason for holding that an alteration in the terms relating to the time should alter the effect of terms relating to the indemnity. . . . If the question turns upon an implication of law arising from the nature of the contract, all the reasons for making the implication in voyage policies are of equal force for making it in time policies. It is equally essential as the basis of the calculation on which the insurer fixes the amount of premium, and equally essential to prevent fraudulent owners from insuring a ship for the purpose of its being lost.”<sup>1</sup>

*Scott v. Avery*<sup>2</sup> is another interesting case arising out of a policy of marine insurance. One of the conditions in a policy of insurance on a ship effected in a mutual insurance company was that the sum to be paid to any insurer for loss should in the first instance be ascertained by a certain committee; but if a difference should arise between the insurer and the committee “relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance,” the difference was to be referred to arbitration in a way pointed out in the conditions: “provided always that no insurer who refuses to accept the amount settled by

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<sup>1</sup> The point was again argued in *Dudgeon v. Pembroke*, 2 A. C. 284. Parke and Campbell expressed the opinion that there was no warranty of seaworthiness in any policy. This view was afterwards adopted in *Thompson v. Hopper*, 6 El. & Bl. 172. Erle dissented, saying, “It does not appear that any person ever expressed the opinion that there was no warranty in any time policy until Baron Parke spoke in the House of Lords.”

Many American authorities favor the minority view. See *Hoxie v. Pac. M. Ins. Co.*, 7 Allen, 211, as a development of the middle ground taken by Chief Justice Shaw in *Capen v. Washington Insurance Company*, 12 Cush. 517.

<sup>2</sup> 5 H. L. 811.



the committee shall be entitled to maintain any action at law or suit in equity on his policy" until the matter has been decided by the arbitrators, "and then only for such sum as the arbitrators shall award." Furthermore the obtaining of the decision of the arbitrators was made a condition precedent to the maintenance of an action. In this case a dispute had arisen between the insurer and the committee as to the amount to be paid, and the former had refused to arbitrate. Crowder, Wightman, Cresswell, and Coleridge, constituting a majority of the judges, took the view, which was adopted by the House, that the prescribed conditions were lawful, and that (even though the difference related to other matters than mere account) till award made no action was maintainable. The losing party relied upon a decision of Lord Kenyon,<sup>1</sup> among others holding that if a contract simply contains a covenant to refer to arbitration, then an action may be brought although there has been no arbitration. The prevailing judges granted the principle of law, established by these cases, that parties cannot by contract oust the courts of jurisdiction. In this case, however, the arbitration was merely a condition precedent to an action. "This is not ousting the jurisdiction of the court," said Lord Campbell, "because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined;" and he illustrated the principle by reference to an action on a horse race which had just been tried in the Court of Exchequer,<sup>2</sup> where the winner, who had contributed to the sweepstakes, said that his horse had won, and brought an action against the stakeholder to recover the stakes. But it was a condition of the race that if any dispute arose the stewards should decide; and the stewards, it seems, had differed in opinion. The plaintiff attempted to show that his horse had won, but it was held that he could not do that—that even if the horse could clearly be shown to have won, the action had not accrued until the arbitrators, the stewards, had determined. Martin, Crompton, and Alderson took a different view of the question. Alderson said:—

"Although the contract provides that a suit may thereafter be instituted, yet the suit is to be only for such sum as the arbitrators may award, thus giving to the arbitrators the entire and exclusive determination of every possible question as to the law of insurance in case of a loss, and leaving to the courts of law alone the insignificant authority of

<sup>1</sup> *Thompson v. Charnock*, 8 T. R. 139.

<sup>2</sup> *Brown v. Overbury*, 11 Ex. 715.

enforcing, if necessary, by suit the fiat of the arbitrators. It seems to me sufficient to state this proposition in order to ascertain how it should be decided. What is it but practically and really to oust the jurisdiction of the courts if you take from them the power to determine all possible questions, and leave them only the barren privilege of being allowed to countersign the decision and enforce payment of the sum awarded by the arbitrators?"

Since the reorganization of the English judicial system by the Judicature Act the judges appear to have been assembled only four times: *Mordaunt v. Moncreiffe*,<sup>1</sup> *Allison v. Bristol Marine Ins. Co.*,<sup>2</sup> *Dalton v. Angus*,<sup>3</sup> *Allen v. Flood*.<sup>4</sup>

The question which arose in *Mordaunt v. Moncreiffe* was whether the statutory proceeding for dissolution of a marriage can be instituted or proceeded with either on behalf of or against a husband or a wife who, prior to the institution of such proceedings, had become incurably insane. A petition of divorce against a wife had been met by an allegation of her insanity and consequent inability to defend herself. The court below appointed a guardian for her, and a verdict of insanity having been rendered, proceedings were suspended, with liberty to the husband, however, to apply to the court in the event of her recovery. The husband appealed to the House of Lords, insisting that the wife's insanity ought not to bar or impede the investigation of the charge of adultery brought against her. It was argued at the bar, in reply, that the suit was a criminal proceeding, or analogous to a criminal proceeding, and so by law could not be carried on against one who was disabled by insanity from making a defence; and that the contrary view would be so obviously unjust and unreasonable that the statute cannot have intended it. But it was held, in accordance with the opinion of a majority of the judges (Brett alone dissenting), that adultery, though a grievous sin, is not a crime, and that the analogies and precedents of criminal law have no authority in a civil tribunal like the Divorce Court. The case was therefore remanded with directions to proceed.

The last two cases, *Dalton v. Angus* and *Allen v. Flood*, involved issues of the greatest importance, and amply deserved the elaborate consideration to which they were subjected. The former case, in which the law relating to easements was exhaustively examined,

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<sup>1</sup> 1 Scotch & Div. App. 374.

<sup>2</sup> 6 App. Cas. 742.

<sup>3</sup> 1 App. Cas. 214.

<sup>4</sup> [1898] A. C. 1.



was twice argued in the presence of the judges. The point actually decided was that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment, for a building newly built or altered so as to increase the lateral pressure at the beginning of that time; and it is so enjoyed if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. The seven judges who attended at the second argument agreed substantially on all the questions submitted to them, except that Lindley, Lopes, and Bowen constituted a minority on the question whether the trial judge should have left to the jury the issue as to whether the enjoyment was in fact open. The opinions of Bowen and Lindley are fine specimens of legal scholarship. This whole doctrine is generally repudiated in this country. Of course, the right of lateral support for land in its natural state is universally recognized.

The case of *Allen v. Flood* has already been ably discussed in the REVIEW, and it will suffice to state the issue briefly. The plaintiffs were shipwrights (and members of a trade union) employed by the Glengall Iron Company on the repair of a ship. The company had also engaged for the iron work on the ship men who were members of another trade union. A dispute having arisen between the two trades as to the claim of the shipwrights to do iron work, the iron workers, with a view to preventing what they consider unfair competition, agreed that they would not work with shipwrights who sought and obtained employment outside their own trade. This action was afterwards brought against the defendant, a representative of the iron workers, for having maliciously induced the company not to engage or employ the plaintiffs as shipwrights. At the trial Justice Kennedy, while he did not suggest to the jury that the action of the appellant apart from its motive constituted a legal wrong, directed the jury to consider whether the defendant acted "maliciously;" and he explained that by maliciously he meant "with the intention and for the purpose of doing an injury." The substance of the verdict was that the company was maliciously induced by the defendant to discharge the plaintiffs. In the Court of Appeal Esher and Lopes, JJ., followed the doctrine laid down in *Temperton v. Russell*, to which Rigby, J., also deferred as binding. The view of the Court of Appeal may be stated thus: To induce another person to commit an act which is within his legal right does not in itself afford a

cause of action, but the person who procured his action is guilty of a legal wrong if he was actuated by an intent to injure. In the House of Lords six of the eight judges who attended were of the opinion that the judgment of the Court of Appeal was right. But the House by a vote of six to three reversed the judgment, holding that an action will not lie against an individual defendant for causing the discharge of the plaintiff by the latter's employer, if the defendant has not committed, or caused to be committed, any act which would be of itself unlawful, without regard to the motive with which it may have been done. The final judgment, therefore, was in accordance with the opinion of eight judges (Watson, Herschell, Macnaghten, Shand, Davey, James, Mathew, and Wright), as opposed to thirteen (Halsbury, Ashbourne, Morris, Hawkins, Cave, North, Wills, Grantham, Lawrance, Esher, Lopes, Rigby, and Kennedy). In spite of numbers the real weight of opinion is decidedly in favor of the final decision. The two ablest judges in the Court of Appeal agreed with the four greatest lawyers in the House.

*Van Vechten Veeder.*



## THE GROWTH OF THE IDEA OF ANNEXATION, AND ITS BREAKING UPON CONSTITUTIONAL LAW.

A STUDY AMONG THE RECORDS OF CONGRESS.<sup>1</sup>

CONSTITUTIONAL law, although based upon a fixed form of words, seems to be a barometer peculiarly susceptible to changes in that strange atmosphere termed, for want of a better expression, public opinion. Public opinion affects all branches of the law, — common law by the imperceptible modification of centuries; statute law more directly and rapidly, for a momentary whim of the legislature may change it. Although not so sensitive as a mere statute, a constitution sometimes appears more like a legislative act than a rule of law; for its interpretation varies — rightly or wrongly — as varies the legislative mind of the people. A perfect grasp of the constitutional law upon a given point, therefore requires a feeling with the nerves, historic and economic, which have vibrated with the life of the people. But when we examine national feelings in order to find their bearing upon the law, we cannot be too careful not to fall into the error of supposing that every idea when once accepted becomes a part of the law. We must never forget the nature of law. Not all the ideas of any particular age of what is just and right are included in it; law is a crystallization of those rules which the consensus of opinion of successive ages agrees to be not only just but necessary for the convenient living of the people at large. This conception is especially true of written constitutional law; the crystallization there is artificial, but when the crystals are wisely formed they consist of only a few fundamental rules, of the soundness of which there can never be a doubt. And such an instrument the framers of our Constitution intended to make; it is a constant, in connection with which fluctuate the different variables of public opinion.

The relation of public opinion to the Constitution is twofold. We must know the state of public opinion at the time the Consti-

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<sup>1</sup> This manuscript was in the hands of the Editor on July 1, 1899. Since that time, it is scarce necessary to add, the statement of the law has not been altered.

tution was framed in order to interpret the express provisions in the light of it; in the second place we must know these doctrines sanctioned by public opinion which nevertheless were not made a part of the Constitution, in order that when public opinion in regard to them is seen to have changed, we may say "the Constitution does not forbid this change."

Pursuing the study of the Constitution in this method, I aim in this paper to consider its attitude towards the acquisition of territory by the United States. Are there limitations to the power to acquire territory, and if so what are they? In answering this question, we must first consider the state of public opinion at the time the Constitution was framed; and the first evidence of this opinion to be dealt with is found in the debates of the convention which framed the Constitution.

The constitutional convention finally gave to the national government the power to make war, the power to make treaties, the power to admit new states, and the power to legislate for certain stated objects. In all of these ways territory might conceivably be acquired; add to these acquisition by discovery, and we have the sum of the possible manners of acquisition. Whether our government has all of these chances open to it is another question.

Only in connection with the admission of new states do we gain any enlightenment from the proceedings of the convention. We have a statement, it is true, of Gouverneur Morris, who proposed the clause giving to Congress power to make the needful regulations for the territory of the United States, that he looked forward to governing not only the western territory already possessed, but whatever might subsequently be acquired; he contemplated as a probability the possession of all of North America, or even more.<sup>1</sup> And so Hamilton in a letter to Washington: "We must remain in a position to take advantage of circumstances, we must be prepared to acquire Florida, and to annex Louisiana, and we must even wink further south."<sup>2</sup> Neither Morris nor Hamilton say how they expect to acquire territory; but it is significant that they recognize the power. It is also significant that both were federalists, with the national idea at heart; and it is very doubtful in the light of subsequent events whether Jefferson agreed with them.

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<sup>1</sup> Letter quoted by Mr. Justice Campbell in *Scott v. Sanford*, 19 How. 507.

<sup>2</sup> Letter quoted by Holmes of South Carolina in the House of Representatives during the Texas debate. *Cong. Globe*, 28th Cong. 2d Sess. 135, 136.



The admission of new states had been provided for in the Articles of Confederation.<sup>1</sup> "Canada acceding to this confederation and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of the Union; but no other colony shall be admitted to the same unless such admission be agreed to by nine states." This provision is expansive, and it is not likely that the later Constitution was meant to be less so. The first resolve presented to the constitutional convention was by Randolph of Virginia, who thought that arrangements should be made "for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government or territory or otherwise, with the consent of a number of voices in the national legislature less than the whole."<sup>2</sup> Nothing could be more ambiguous than this; probably he was thinking of new states becoming included within the limits of the sovereign United States by those limits being enlarged either by warlike or by peaceful means; he may have been trying merely to cover the strange case of those of the thirteen who might not at first ratify the constitution, or the case of Vermont, which was hanging to New York by a slender thread. Two non-committal resolutions followed; the matter was then referred to a committee of five who reported a clause which, in part, provided that "new states lawfully constituted or established within the limits of the United States may be admitted by the legislature into this government,"<sup>3</sup> by a vote of two-thirds of each house. This clause seems to have the same meaning, or lack of meaning, as Randolph's proposition; and the words "within the limits" hardly refer solely to the limits then existing. But these words were struck out by the convention in striking out the whole phrase, "lawfully constituted and established within the limits;" so that the clause as adopted reads simply, "New states may be admitted into this Union."<sup>4</sup> The reason for the change was probably for the benefit of Vermont, the convention being in doubt whether Vermont's establishment could be called lawful. The emphasis of the change does not seem to have been laid on the words "within the limits," nor do they seem to have been looked upon as unduly restrictive; so far as they meant anything, they probably meant that territory must first be annexed and made "within the limits" of the nation before it could become

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<sup>1</sup> Art. xi.

<sup>2</sup> Ell. Deb. iv. 42.

<sup>3</sup> Art. 17. Ell. Deb. iv. 123.

<sup>4</sup> Const. Art. iv. sec. 3.

a state; but striking them out hardly signified that power was granted to admit as states territory not yet annexed.<sup>1</sup> Then follows the restriction — which was also in the clause reported by the committee of five — that “no new states shall be formed by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned as well as of Congress.” From this clause, however, no general restriction can be implied; the clause was a sop to those who were jealous on behalf of the states; it protected the states; it did not restrict the admission of other states when their admission interfered with no rights of existing states. Upon the whole then the growth of this clause favors the belief that territory not yet belonging to the United States might one day become a state; and this belief does not require us to go to the length of saying that by virtue of this clause and no more Congress could admit territory without first annexing it. The manner of acquiring territory, and the tests for eligibility, we still must guess about; all that we may be at all safe in assuming is that the federalists thought they were creating a sovereign able to annex adjacent territory by any of the acts of sovereignty suitable thereto; otherwise the letters of Morris and of Hamilton would be meaningless.

Having now glanced over this most direct evidence of the opinion of the time without finding an answer to our inquiries, we may at least have some success in discovering what territory was sought for by filling in the vague outline which we have found with the prevalent colors of the public thought. I am dealing not with details, but with general characteristics. Public opinion at the time our Constitution went into operation had a character decidedly individualistic, especially in New England. The doctrine of the Pilgrims of religious toleration, and the rather intolerant independence of the Puritans, marked a distinct break with the sovereign government of the past, — a break accomplishing in a comparatively short time the results which required two centuries of change in more conservative England. The thought was laying hold of men's minds that grades of rank and authority among private persons must give way to the freedom of each person from arbitrary restraints, that each man is free to think and act so long as he interferes with no one else, that he may have a voice in his own political

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<sup>1</sup> But see many arguments during the Texas debate, as, for instance, that of Ficklin of Illinois. Cong. Globe, 28th Cong. 2d Sess. 182.



systems, and that he is not to be constrained by a law which he has not had a voice in enacting. The same movement in England, following the lead of Bentham, resulted in the repeal of the Test Act, and the measures for Catholic emancipation, the reform of Parliament, and the relief from imprisonment for debt.<sup>1</sup> In this country the movement was not impeded by so much immemorial custom as in England, but it is a mistake to suppose that by 1788 the colonies had finished the work which in England continued until the reform bill of 1833 and later. Earlier than England the start had indeed been made; and the intense events of the revolution had brought matters somewhat to a head. But the application of these principles to practical legislation for private persons was by no means fully developed; and municipal legislation in some respects might have done credit to a veritable despotism. In 1640 the colony of Massachusetts Bay had passed a declaration of rights resembling the fourteenth amendment; but at the same time the people of Dorchester, Massachusetts, New Haven, Connecticut, and other towns, were forbidden by law to alienate their property without the consent of the town.<sup>2</sup> Bentham would hardly have looked with favor upon that idea. Yet until the Revolution there were similar laws upon the statute books.<sup>3</sup>

The ideas of individualism are most frequently thought of and spoken of in connection with the rights and duties of individual persons; but their application will be found to be equally clear to the rights and duties of nations, in which we are now more particularly interested. Although the analogy between persons and nations is not always perfect, and principles applicable to the one are not always applicable to the other without modification, the analogy between the two is in the present instance instructive, and public opinion in 1788 applied the same broad general principles in both cases. The same rights of individual freedom from restraint were accorded to collective persons, townships, states, sovereigns; and the corresponding duty was imposed of respecting those rights in others. Just as the most selfish person desired above all things

<sup>1</sup> For the general conception and the history of these changes in public opinion in England, a discussion of the different phases of individualism, followed by a treatment of the great change which took place during the middle of this century, I am indebted to Mr. Dicey, Vinerian Professor of Law at Oxford University, in the course of lectures delivered in the autumn of 1898 before the Harvard Law School. It is a matter of regret that as yet no published work of his can be referred to.

<sup>2</sup> Weeden, *Economic and Social History of New England*, i. 55-57.

<sup>3</sup> Weeden, ii. 519.

liberty to pursue his own ends, and asked only to be allowed freely and fairly to compete with his neighbor, — just as the most generous man thought it the greatest charity to allow his brother freedom and fairness in working out his problems for himself, so the most selfish nation desired above all things liberty to develop itself unhampered by the entanglements of the affairs of other nations, freely and fairly to compete with them, — so the most generous nation thought it the greatest charity to leave other nations free and unhampered to work out their national problems.

This one power of individualism generated the two great conflicting forces which shaped the course of the constitutional convention. Their variance was caused by the difference in the attitude of those who guided them. One party, then called the republicans, looked within at the sovereign state; they were unwilling to have each state part with the sovereignty which it had momentarily gained; they were jealous of giving any more power than was necessary to the central government. The phase of individualism which they represented, the individualism of the state, had early reached a full growth as the individualism of the colony. It had shown itself in the independent behavior of Massachusetts which led to the revocation of the charter. It asserted itself in youthful exuberance at the Boston Tea Party, and later it ignored the wishes of the Continental Congress with almost as much determination as it had ignored the will of King George. Of the disciples of this feeling Jefferson became the leader, and in all the thought and feeling which he gave to them they were at the head of the race of individualism; and in fact much is to be found in the writings of Jefferson not unlike some of the writings of Bentham. The other party looked without, and saw the need of a compact national existence to preserve the free and unrestrained life among the nations of the world; they were the federalists with Washington, Hamilton, and Marshall at their head. Their phase of individualism, that of the nation, had not been so early a growth as the first, but suggestions of it are found in the first weak attempts to form a union of colonies. The necessities of the revolution gave new strength; and the disastrous years of the confederation, which proved the *ultra* state rights theory to be a failure, re-enforced by the isolation of position of the new nation, set in motion the wave of national feeling which led to the adoption of the Constitution. Thus it is that the national phase of individualism dominates our fundamental law.



The difference of these two forces caused the difference in the great political parties; but a third force is not to be ignored, not a branch of the national idea, but another phase of individualism then less developed than the other; its direction was towards the freedom of each private man, and its power was strongest among the followers of Jefferson as the liberal party. The logical development of these ideas, or rather these three phases of a single idea, was what occupied the nation up to the Civil War.

We are now in a position to fill in the outlines, hinted at by the debates in the constitutional convention, of the territory which public opinion regarded as a possible part of the United States. We saw that Canada, Florida, and Louisiana were thought of. In the light of the doctrines of the national individualism we may now say generally that all land was looked upon as eligible which would, in the words of Jefferson, "naturally accede to our Union," land geographically a part of us, with inhabitants consenting to the union, akin to us in race and custom, — inhabitants who, becoming a natural part of our community, should promote our peace and prosperity at home, and strengthen us in the security of our independence of nations abroad.

This theoretical ideal of national individualism we may proceed to consider in its relations to historical facts, as our country began to have a history.<sup>1</sup>

After the original thirteen states had ratified the Constitution, Louisiana was the first land which was presented for annexation, and in that connection for the first time was the constitutional power to annex territory called in question. Some writers<sup>2</sup> have expressed a doubt as to our right to the northwest territory at the time the Constitution went into effect; that at all events is a preconstitutional question; by the ordinance of 1787 the Confederacy had assumed control, and the Constitution found the territory, for political purposes, the property of the nation. The case of Louisiana was the first arising under the new Constitution.

Trouble had arisen in 1803 over the suspension of our right of deposit at the port of New Orleans. This interfered seriously with our trade upon the Mississippi; it led also to disagreeable altercations with France, then embroiled in European wars. The obvious

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<sup>1</sup> In treating the various additions to our territories, I omit lands such as the guano island of Navassa, for they have no significance from the point of view of national policy.

<sup>2</sup> Baldwin, *Government of Island Territory*, 12 HARV. LAW REV. 393.

thing to do was to buy the port, and the President could not help seeing it. Jefferson was President, the champion of the states and of democracy; and chance illogically enough chose his party to do the first act of national aggrandizement. He negotiated the treaty, and urged its adoption. His tone sounds of the national individual, the strength of the nation, the need of freeing our commerce at home and the necessity of holding aloof from European politics. Individual this is indeed, but its individualism is of the nation, and it sounded far from harshly to the ears of the federalists whom fate had placed in opposition. They had little heart in denying to the United States the right as a sovereign to acquire territory; they were naturally content to be side-tracked and to direct their attack upon the clause which provided that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States."<sup>1</sup> What this meant was not entirely clear; some appear to have construed it to mean that the United States was pledged as soon as possible to admit the new territory as a state of the Union;<sup>2</sup> another faction insisted that this clause merely pledged us to make the territory a part of the sovereign nation called the United States, without necessarily admitting it as a state.<sup>3</sup> In either case this was said to be an abuse of the treaty-making power. The incorporation, it was said by some, could not be accomplished without an act of Congress.<sup>4</sup> Pickering of Massachusetts went further and said it could not be done without the consent of all the states, treating them as a partnership.<sup>5</sup> These arguments looked from the point of view of the individuality of the state; they best became the mass of Jefferson's party; but politics ran too strong among that party to allow this matter of theoretical consistency to trouble their minds. Other objections came from those who looked from the point of view of the individual man, denying any power to the United States not expressly granted, and asserting the power of the people. Of these men Gaylord Griswold maintained that even if territory could be acquired by treaty, it could not be incorporated by anything short of the power of the people speaking through an amendment to the Constitution.<sup>6</sup> Others went so far as to deny that

<sup>1</sup> Treaty of April 30, 1803, Art. 3; 8 Stat. 200, 202.

<sup>2</sup> Cong. Ann., 8th Cong. 1st Sess. 44, 454, 459, (Pickering, Thatcher, and Griswold of Connecticut).

<sup>3</sup> *Id.* 49, 483 (Taylor and John Randolph).

<sup>4</sup> *Id.* 454 (Thatcher).

<sup>5</sup> *Id.* 44 (also Thatcher, 454, and Griswold of Connecticut, 459).

<sup>6</sup> *Id.* 432.



territory could be acquired at all except by amendment, all such power being retained by the people.<sup>1</sup> And John Quincy Adams, with characteristic altruism, applied the Benthamite doctrine not only to the people of the Union but to the people of Louisiana; and in their behalf, reading into the Constitution the doctrine of the Declaration of Independence, that all just government depends upon the consent of the governed, he maintained that in no way could the United States acquire foreign territory without the consent of the inhabitants of that territory.

These arguments were unavailing to defeat the treaty or to prevent appropriations for carrying it out.<sup>2</sup> As a matter of theory they would have come with far better grace from the party of Jefferson, and since for political reasons many of that party were content to ignore them, it is no wonder then that the doctrines died away. Those who logically should have supported them turned a deaf ear. I am not referring to their correctness; for the present I am dealing merely with events; and according to the tenets of the Jeffersonian creed it is not difficult to imagine how loud the echo of these arguments would have been if Jefferson and his adherents had been in opposition. Despite that gentleman's reticence we know what his opinions were. Incorporation of territory into the Union no doubt he thought unconstitutional, and, although he wavered somewhat, from his letter to Judge Breckinridge he appears to recognize no constitutional way whatever for holding foreign territory. "The Constitution," he says, "has made no provision for our holding foreign territory, still less for our incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of the country have done an act beyond the Constitution. The legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it."<sup>3</sup> His reasons for this opinion

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<sup>1</sup> This seems to have been Jefferson's view.

<sup>2</sup> 2 Stat. 245. For the arguments in defence of the treaty of Cong. Ann., 8th Cong. 2d Sess. 49, 58, 68, 446, 471, 483, by Taylor, Breckinridge, Nicholas, Elliott, Rodney, and Randolph.

<sup>3</sup> Jefferson, Works, viii. 244. Cong. Globe, 28th Cong. 281, 2d Sess., cited by Morehead of Kentucky. But see the letter to Gallatin during the same year, Works, viii. 241.

he does not explicitly state. That the power to acquire territory was retained by the people was doubtless his creed. The quest is difficult for information from a man who could write to his attorney general that "the less that is said about the constitutional difficulty the better, and that it will be desirable for Congress to do what is necessary *in silence*."<sup>1</sup> Again, in 1803, he writes to Nicholas, "Whenever [*sic*] Congress shall think it necessary to do should be done with as little debate as possible, and particularly as far as respects the constitutional difficulty."<sup>2</sup> By these tactics he kept his party well under control, imposed upon them the policy of absorbing outlying territory, and forced upon the federalists an opposition little consistent with their original instincts and their general belief in the individualism of the nation. Forty years later opposition to the fulness of the powers of the national sovereign was taunted as "federalism."<sup>3</sup> This political hoax was the first move by which the course of politics nullified the force of what might have become, rightly or wrongly, a dominant legal doctrine.

The accomplished fact of annexation of Louisiana had great influence, no doubt, upon legal thinking. It became, politically speaking, *chose jugée*, not indeed a legal authority but entitled to some weight. So far as it has weight, no more should be attached to it than is its due. The acquisition must be read with all the facts; it expressed the national individualism; it was defensive, to preserve the national unity; a mere taking of adjoining land to protect the peace and prosperity at home; it was subjective, not objective.<sup>4</sup>

The same ideas controlled the next acquisition of territory. Florida was acquired by treaty with Spain in 1819, with a proviso for incorporation into the Union essentially like that in regard to Louisiana.<sup>5</sup> The prevailing feeling that led to it was the same that expressed itself in the Monroe doctrine, the wish to insure safety at home by keeping from our immediate vicinity the influence of European powers.<sup>6</sup> There was practically no opposition to the taking of Florida, which was accepted as a matter of course. The most serious objection, in fact, was made to quite a different part of the treaty, the clause withdrawing the claims of the United States to Texas. This withdrawal had really no significance upon

<sup>1</sup> Cong. Globe, 28th Cong. 281, 2d Sess., quoted by Morehead.

<sup>2</sup> Ibid.

<sup>3</sup> Cong. Globe, 28th Cong. 2d Sess. 100, speech of Yancy of Alabama.

<sup>4</sup> Jefferson's Message, Cong. Ann., 8th Cong. 1st Sess. 11, 14, 15.

<sup>5</sup> 8 Stat. 252. The treaty was ratified February 19, 1821.

<sup>6</sup> Monroe's Message.



national policy; it amounted merely to a compromise in regard to disputed territory; it is interesting chiefly by reason of the stress laid upon it in 1844 by certain supporters of the admission of Texas, who persisted in their belief that Texas had never rightfully been parted with.<sup>1</sup> Adams, who as secretary of state negotiated the treaty, looked upon it merely as the waiver of a doubtful claim, recognized the advantage of some day acquiring Texas, and afterwards when president set on foot fruitless attempts to purchase it from Mexico, with always a provision for obtaining the consent of the people of Texas.<sup>2</sup>

With Adams, as we have seen, began the Texas question; with him too began the question of the acquisition of Cuba. He looked upon taking that island as a thing as politic as the taking of Florida, in order to remove Spain further from us and to add to the unity of the Union.<sup>3</sup> He thought of it as involving no matter of foreign politics, — still the subjective standpoint. And Jefferson agreed with him.<sup>4</sup> No definite results were reached by either of them in this matter; but the policy of the administrations of Monroe and Adams seems to have had this basis. Cuba was threatened by France and also by Columbia and Mexico. Our influence was used not only to keep France away, in accord with the Monroe doctrine, but to prevent the other American states from encroaching.<sup>5</sup>

Adams was doubtless profoundly thankful twenty years later that he had not obtained either Texas or Cuba. At the time men hardly realized the presence of what it has become the fashion to call the thundercloud of slavery, hanging over the country.<sup>6</sup> But the afore-

<sup>1</sup> Cong. Globe, 28th Cong. 2d Sess. 328,<sup>o</sup> 332 (Ashley and Dayton in the Senate); and 87, 95, 130, 158 (Belser, Douglass, Tibbatts, and Hammett in the House).

<sup>2</sup> Cong. Globe, 28th Cong. 2d Sess. 188, 190.

<sup>3</sup> *Ibid.*

<sup>4</sup> Quoted by Walker, Cong. Globe, 28th Cong. 2d Sess. 344, as saying of Cuba, Texas, and Florida, "They would naturally accede to this Union." See also Jefferson, Works, ix. 125; x. 159, 250, 278. On October 24, 1823, Jefferson wrote to Monroe: "I candidly confess that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of States. The control which, with Florida Point, this island would give us over the Gulf of Mexico and the countries and isthmus bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being."

<sup>5</sup> Lodge, the Spanish-American War, Harper's Monthly, xcvi. 449, 450.

<sup>6</sup> The slaveholders were the first to realize this; they made the most serious opposition to sending delegates to the Panama Congress in 1826, and their reason was that the black republic of Hayti was to be represented. Earlier than this, when Florida was acquired, the South looked on with complacency, but the slavery question was not generally discerned in all its bearings. This is all the more surprising in view of the struggle which took place over the Missouri compromise at so nearly the same time.

said thundercloud grew rapidly blacker, and, as those who invented the figure would say, its rumblings rendered inaudible the clear voice of constitutional law. Different views of the law existed, but in choosing between them political considerations often turned the scale. And these political considerations were the primary forces in directing the next acquisitions of territory, and they mark a second stage in our history of national enlargement. The ideal of national individualism is still a latent and powerful force; but motives have become more complex. The new feelings which govern this second stage of territorial growth must be examined, and we find that all in the last analysis are different manifestations of the ideas of individualism.

The institution of slavery called to its aid the doctrine of state rights, resting upon the sovereignty of the individual states as opposed to the nation. This doctrine was an inheritance from the Articles of Confederation, and when invoked in the cause of slavery it reached an extravagant extent. As opposed to it the abolitionists advanced the *ultra* theory of the freedom of each individual man, asserting even that Congress had power to abolish slavery within the states. So bitter became the slave states that they ignored their inconsistency in applying their idea of individualism to their states and applying the idea of despotism to those who labored within the states.<sup>1</sup> The abolitionists ignored their inconsistency in wishing to free the slaves at the expense of the constitutional freedom of the individual states. Those alone were consistent who conceded that slavery could not be abolished within the states, but contended that no new slave states should be admitted to the Union. It was along these lines that the battle against slavery was fought, until true individualism triumphed in Lincoln's Emancipation Proclamation and Lee's surrender at Appomattox.

The bearing of this condition of things upon the acquisition of territory is obvious. The South was determined to have new slave states. As, in the case of Louisiana, the state rights men were compelled to favor the power of the nation to take new

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<sup>1</sup> This antinomy appeared in livid colors when Kossuth came to America, and a cry went up from South as well as North to help the cause of the liberty of Hungary; but Kossuth had to be cautioned against mentioning domestic slavery in any of his speeches. 4 Von Holst, 65-80.

Mr. Foote of Alabama, in a speech in the Senate eulogizing Kossuth, forgot himself so far as to declaim that the man who was not for freedom was for slavery. "Entirely right," remarked Mr. Hale of Maine.



territory into the Union, so now the power of slavery forced them to take the same position irrevocably. And this was the death-blow to the Jeffersonian belief that the people alone could acquire territory.

The story of the rebellion of Texas against Mexico, the intrigues of politicians and even presidents to obtain its acquisition as a slave state of the Union, the negotiation of the treaty by Tyler and its defeat in the Senate, — this story belongs to the historian.<sup>1</sup> The rejection of the treaty was not in the main on constitutional grounds, although some senators reiterated the arguments already noticed, and Rufus Choate went into a metaphysical argument to prove that the admission of a sovereign nation like Texas did not come under the treaty-making power. A new president and congress would come into power in less than a year, and no time was to be lost. So the annexationists in the House introduced various joint resolutions to accomplish their end by legislative act. This ruse was a novel one, and its opponents in the north were satisfied to attack it for its departure from what had already become tradition. Their general argument was this: we will grant, at least for the sake of argument, that foreign territory can be taken by treaty, but it cannot be taken by legislative act, because Congress has no power to deal directly with foreign nations; only the treaty-making power can do that.<sup>2</sup> A few went beyond this position. Choate, who with lawyer-like care had already committed himself only to the extent of saying that the taking of a foreign state was not within the treaty-making power, was now forced to state his opinion that in no way short of constitutional amendment could new territory be admitted — unless indeed in settlement of boundary dispute.<sup>3</sup> Winthrop in the House took the same view,<sup>4</sup> and Brengle,<sup>5</sup> citing Jefferson in justification, and Barnard<sup>6</sup> of New York. McIlvaine<sup>7</sup> of Pennsylvania was perhaps the only one to deny the possibility of obtaining any foreign territory. In spite of the distinguished support which Jefferson's views found in Choate and Winthrop, the fact that such men had so few followers shows the weakness of the

<sup>1</sup> This story is well told in Von Holst, volumes 3 and 4.

<sup>2</sup> Cong. Globe, 28th Cong. 2d Sess. 247, 292, 278, 344, 358, 359 (in the Senate, Rives, Morehead, Berrien, Crittenden, and Archer, chairman of the Senate Committee on Foreign Affairs); and 108, 141 (in the House, C. B. Smith and Severance). This view was not confined to the north; it was generally understood to be Calhoun's belief.

<sup>3</sup> Cong. Globe, 28th Cong. 2d Sess. 303.

<sup>4</sup> Id. 94.

<sup>5</sup> Id. 119.

<sup>6</sup> Id. 187.

<sup>7</sup> Id. 190.

cause; their opponents were able to retort Jefferson's apostasy.<sup>1</sup> Adams still maintained that if the consent of Texas were obtained it could be annexed by treaty; but he based his opposition upon the ground that treaty alone could accomplish the result.<sup>2</sup>

Those who supported the joint resolution did so upon one or more of these grounds. The incorporation of foreign territory, it was said, is an attribute of sovereignty; and as no attribute of sovereignty was lost when the constitution was adopted, and this power no longer belonged to the states, it must belong to the United States; and an act of Congress was the most appropriate manner of exercising the power.<sup>3</sup> Others asserted that the joint resolution was a proper act of secondary legislation, and justified it in order to promote domestic commerce and provide for the common defence.<sup>4</sup> A third view was that the express grant of power to admit new states included the power to admit a state not yet the property of the United States.<sup>5</sup> The last, perhaps the weakest, of the three met with the widest acceptance. Another argument somewhat pressed was that Texas once was a part of the United States, and having wrongfully parted with her the United States was under an obligation — at all events a moral one — to restore her to her true position. But throughout the whole discussion it is rare to find an unbiased speaker; the all-absorbing question was: Shall there be another slave state?<sup>6</sup> Slavery was allowed to influence the view taken of the constitution. Yancy of Alabama declared it to be our constitutional duty to annex Texas in order to protect the constitutional guaranty in favor of slavery, — a guaranty which he found implied in the recognition in the constitution of the existence of that institution.<sup>7</sup> That there was any such guaranty his adversaries of course denied, and Winthrop went so far as to find in the prohibition of the slave trade after 1808 an implied condemnation of slavery, and a ban upon the admission of any further slave states.<sup>8</sup> These latter arguments may be disposed of now by saying

<sup>1</sup> Cong. Globe, 28th Cong. 2d Sess. 344 (Walker).

<sup>2</sup> Id. 188, 190.

<sup>3</sup> Id. 328, 344, 109 (Ashley and Walker in the Senate; Owen in the House).

<sup>4</sup> Id. 334 (McDuffie in the Senate); 102, 118, 167 (in the House, Bayly, Weller, and Caldwell).

<sup>5</sup> Id. 329, 334 (Dickinson and McDuffie in the Senate); 95, 100, 182, 186 (in the House, Douglass, Yancy, Ficklin, Dromgoole, etc.).

<sup>6</sup> See for example the speeches of Allen in the Senate and Joshua Giddings in the House, Cong. Globe, 28th Cong. 2d Sess. 342, 169.

<sup>7</sup> Cong. Globe, 28th Cong. 2d Sess. 100.

<sup>8</sup> Id. 94.



that they had little virtue then, and are to-day wholly unimportant except to serve as illustrations of the length to which men went to bring in the question of slavery. The relative values of the other and more important lines of reasoning will be considered later; for the present it is sufficient to note the fact that these points were made.

By reason of these arguments of the friends of the President, and in spite of the arguments of the opposition, — or perhaps without any reference at all to any arguments on the constitutional question, — the annexationists carried their point. The joint resolution passed both Houses that "Congress does consent that the territory properly included within and rightfully belonging to the republic of Texas may be erected into a new state to be called the State of Texas . . . in order that the same may be admitted as one of the states of this Union," upon certain conditions; to this the Senate added the provision that if the president should deem it advisable "be it resolved that a state to be formed out of the present republic of Texas . . . shall be admitted into the Union by virtue of this act."<sup>1</sup> Under this last provision Texas was admitted.

From this time on events came thick and fast, and the race between the two parties of individualists became more and more furious, — on the one hand, those who looked to the freedom of every inhabitant of the United States, and on the other, those who sought the freedom of the state in the subserviency of the individuals within it. The main struggle came over the government of territory when acquired; but the struggle on the part of the South was also to gain territory out of which to mould slave states. The nation was rushed through an impious war with Mexico, and by conquest and by subsequent treaties California, Arizona, and New Mexico were added to our possessions, with a proviso, as in the case of Louisiana, for their incorporation into the Union. To the treaties of cession there was little opposition on constitutional grounds; acquisition of territory by treaty was an old story, and the people were sick of this war. The bitterest opposition was to the first treaty, that of Guadalupe Hidalgo,<sup>2</sup> by which the United States acquired an enormous tract of possible slave territory. The debate in the House over the appropriation to carry out the treaty

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<sup>1</sup> Cong. Globe, 28th Cong. 2d Sess. 362; 5 Stat. 797. See also 9 Stat. 108.

<sup>2</sup> 9 Stat. 922.

was such as fully to justify Christfield's complaint,—“But, sir, this debate has glided from the topics properly before us, and we now find ourselves in the midst of the slavery question.”<sup>1</sup> It is striking that while the anti-slavery party urged almost every possible objection to the treaty, scarcely a word was said against acquisition of territory by the treaty-making power; the nearest approach to such an objection was made by those who, like Mr. Stephens, denounced a war of conquest as contrary to the spirit of the constitution.<sup>2</sup>

Much calmer was the debate upon the appropriations to carry out the Gadsden treaty, by which the United States acquired most of what is now New Mexico and Arizona.<sup>3</sup> The character of the country was such that the slavery question drew to the background.<sup>4</sup> There was, nevertheless, determined opposition,<sup>5</sup> yet no one objected generally to the principle of acquiring territory by treaty.

<sup>1</sup> Cong. Globe, 30th Cong. 2d Sess. App. 227.

<sup>2</sup> *Id.* 145. The fight against this acquisition of territory began in the 29th Congress. The appropriation of three million dollars, made before the treaty was negotiated, was coupled originally with the Wilmot proviso, excluding slavery from the territory to be acquired. Upon this proviso turned most of the debate, and the proviso was eventually stricken out by the Senate. 9 Stat. 174.

The part which slavery played in the contest over the final appropriation bill in the 30th Congress is illustrated by Schenck's amendment. That amendment provided that California should be given back to Mexico. It was rejected by the vote of 194-11; among the eleven who voted for it were Horace Mann, Giddings, and Palfrey,—all strong opponents of slavery. Upon the final question on the appropriation in the House, Giddings still voted against it; Palfrey voted for it, obviously because if the United States were to keep the territory it would be unconscionable not to pay for it; Horace Mann did not vote. Cong. Globe, 30th Cong. 2d Sess. 557, 558, 559; 9 Stat. 348.

<sup>3</sup> 10 Stat. 1031; *id.* 301.

<sup>4</sup> See the dialogue between Smith of Virginia and Perkins of New York, Cong. Globe, 33d Cong. 1st Sess. 1548, 1549.

<sup>5</sup> There was much discussion whether Congress had discretion in granting or withholding the appropriation. The general view was that Congress had such discretion. Those opposed to the purchase either agreed with Benton (Cong. Globe, 33d Cong. 1st Sess. 1519, 1520) that the privilege of the House had been violated by negotiation of the treaty without the House having been first consulted, or else took the ground emphasized by Giddings (who, however, also agreed with Benton) that the House had not sufficient data to judge of the value of the new country, and that suspicious circumstances raised a presumption against the treaty (*id.* 1541).

The opposition to the appropriation was confined almost wholly to the House. The majority, in both House and Senate, were anxious to carry out the treaty in order to put an end to the dispute with Mexico, to arrange boundary difficulties, to escape certain onerous undertakings entered into in the treaty of Guadalupe Hidalgo, and to secure a railroad route to the Pacific. Of this general line of argument the speech of Boyce in the House is a fair sample. Cong. Globe, 33d Cong. 1st Sess. 1543.



But the race for territory was not yet ended. This race did not on the side of either party signify a change in foreign policy, or show that either was departing from the idea of the national individual. Neither considered that question as at all a vital one. The point of view remained as it had always been, wholly subjective, and whoever desired foreign territory desired it merely with reference to the one domestic question of vital concern. In so far as the matters already touched upon are concerned the South had won the race in acquiring territory, although their triumph was somewhat qualified by the acts for regulating the territories when acquired. There were two attempts to acquire further territory which failed, — one immediately after the close of the Mexican war, and the other shortly afterwards. The first was aimed at Yucatan. In 1848 a message from President Polk informed Congress that the people of Yucatan were in danger by reason of an Indian uprising, that they had offered to give themselves to the United States in return for protection; he urged the giving of aid for the sake of the Monroe doctrine, for if the United States refused aid England or Spain would be applied to. As a matter of national policy the affair is not to be taken too seriously. It was a bait thrown out by the pro-slavery cabal, and although it drew some unsuspecting supporters, it did not take with all the southern side. Calhoun bitterly attacked the proposition as an unwarrantable extension of the Monroe doctrine, and after it was referred to the committee on foreign affairs it was not further heard of.<sup>1</sup>

Towards the end of Fillmore's administration the revolution in Cuba became prominent. An offer was made in 1848 by Buchanan, as secretary of state, of \$100,000,000 for the purchase of the island; but Spain indignantly spurned the offer.<sup>2</sup> Frequent aggrieved complaints came from Spain that the neutrality of the United States was not very genuine. Genuine it certainly was not, and Fillmore's attempts to prevent filibustering expeditions were designedly incompetent. Twice were expeditions allowed to reach Cuba in aid of the insurgents, and when President Pierce came into office the South had taken up the cause of Cuba as a possible new slave state. The second Lopez expedition was landed in Cuba, but the Spaniards soon got the upper hand, and, foolhardily though justly, executed the ringleaders. This piece of bravado did not

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<sup>1</sup> Cong. Globe, 30th Cong. 1st Sess. 709-740, 777, 778.

<sup>2</sup> 3 Von Holst, 441. The agitation in favor of Cuba is well described in this volume and in those following.

tend to calm the feelings of the Cuban sympathizers in this country; in fact they burned the Spanish consulate in New Orleans, looted the houses of the Spaniards, with the aid or at least with the connivance of the police, and did many things that they ought not to have done. Matters had reached a pass when the President could no longer remain in a colorless position; vigorous steps were taken to suppress filibusterers. But the question was not allowed to end; the President had only gone about on a new tack. Soulé was sent as minister to Spain with instructions to buy Cuba. Spain was by this time considerably irritated and would hear nothing of it. Soulé thereupon concocted the Ostend manifesto in the summer of 1854,—a declaration to the world that the United States wished to buy Cuba with a hint (whether designed or not is a matter of conjecture) that if Spain would not sell, the United States would have to levy upon the property. Soulé continued in this vein a little too far and had to be disavowed; but the purchase of Cuba was still agitated until the Civil War. The hollowness of the whole affair, however, apart from the question of slavery, became evident whenever it was rumored that Spain proposed to emancipate the slaves in the island. Such emancipation would destroy Cuba's eligibility as a slave state; it would also add stimulus to the general cause of emancipation. Therefore, it was said, this emancipation when it came, would be a cause for war with Spain, a war of self-preservation on the part of the United States.

The fight between the individualism of the state, which had long become a dogma rather than a creed, and the freedom of the individual, lasted to reach the triumph of the latter in the Civil War. In the sovereign nation the general doctrines of Bentham first reached their recognition, and became a part of our national existence. The opposition which would have come from the state rights party was put an end to by the chance which made that party for its own ends the champion of each particular acquisition of territory. And after the new territory had become recognized as a part of the United States, no party had much heart in denying that there was power to do what had in fact been done. Now at last the ideas of individualism had circulated through the nation's entire frame until they were recognized as the principles applicable to each man as a man. The movement which started with the Pilgrims had worked itself out, or had at least reached a new stage. As touching the nation new thoughts and feelings had already found utterance,



which were strange to the ears of the older men. Perhaps it was a mere political game that Webster was playing when he voiced the attitude of the Union towards Kossuth in his struggle against Austria for the liberty of Hungary.<sup>1</sup> But his letter to the Austrian minister, while disavowing any intention to intervene forcibly, was aggressive in tone; it threw the moral influence of the United States, not for the preservation of democratic institutions at home, but for the introduction of these institutions into foreign lands; its objective attitude was a marked change from the subjective attitude with which we had formerly defended ourselves against the Holy Alliance. On Webster's part this may have been, as I have said, merely a move in his political chessmen, but the response which it received throughout the country, especially in the north, showed a genuine feeling that our liberties were objective as well as subjective. The same chord had been struck by some few disinterested persons who had favored interference in Yucatan for the sake of the Yucatanese, and who were eager to interfere in Cuba for the sake of the Cubans; but there were not yet many such persons — few could be so blind as not to see that the slave-holders were using their sympathies as tools. Kossuth's visit accomplished nothing for him, but it served to bring out two facts; not only, as I have already hinted, that the party of the south could not in the same breath talk about the liberties of Hungary and the institution of domestic slavery, but also that a change was coming on in the attitude of some people to the doctrines of Washington's farewell address. President Pierce in his inaugural said that territory was to be acquired in every honorable way, and in the course of it he used the word "expansion," with which the country is now so sorely afflicted. The Koszta affair too was another note in the same key. It became clear that as a nation the Union was becoming unwilling to live apart and was growing anxious to make itself felt as a positive influence upon the affairs of other nations.

The change in public opinion which thus manifested itself was not confined to foreign politics. It was a phase in that great movement still going on, the movement of combination and collectivism, in which the freedom and benefit of the individual are being made to give way to the good of the aggregate. It was in relation to the affairs of individual persons that the change first became marked. Trades and employers were combining; corporations

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<sup>1</sup> 4 Von Holst, 69, 73.

were multiplying. The idea of legislation was quick to change, a change which appeared in two kinds of legislative acts. Of these one kind took upon the state the performance of acts supposed to be for the public benefit, acts which before had more generally been left to private enterprise. The people as individuals were more and more taxed for the collective good of the people as a whole. Illustrations of such legislation may be found in the frequent exercise of the right of eminent domain for the benefit of railroads on an enormous scale; and different forms of the exercise of the police power fill the reports each year with an increasing number of decisions whether they deprive the individual of life, liberty, and property. It is not the passage of the Fourteenth Amendment alone that has caused this change: it is a real increase in the legislative acts, passed presumably for the public weal, which work oppression to individual members of the community.

The change is seen also in another class of acts, standing beside and sometimes among the acts last mentioned. These are acts of what is called paternal legislation, carried to such an extent that the most ordinary pursuits of everyday life are restricted and regulated. Improvements cannot be made in the plumbing in a man's house except in a way sanctioned by an official; no building can be erected except as approved. Liquor cannot be bought except under certain circumstances, and in some places not at all; and matters are subjected to public control which a man of Bentham's views might well declare were no one's business except his own.

Nations as well as persons were affected by this change in the state of public opinion. The same tendency to combination was evinced, notably in the case of the concert of Europe; and even in the absence of combination the aggressive, the objective, attitude became more marked. The most selfish nation found its object of desire, not in the independent, unhampered life of free competition, but in the life of aggression. Its aim became that of impressing itself upon others, and of extending its influence at others' expense. And so also the attitude of altruism became altered, and the most unselfish nation saw the highest service, not in permitting other nations to work out their own problems, but in offering advantages and compelling their acceptance, — with very little thought whether the forms or even the substance of these advantages were in conformity with the wishes of the objects of charity.

The atmosphere which pervaded the concert of Europe has blown



over our hemisphere, and has affected our political thought. When a correspondent of one of our newspapers writes that the Monroe doctrine logically extends to China, and we should interfere to prevent foreign nations from getting a foothold there, his statement is absurd enough, for it is not the Monroe doctrine at all. And yet there is a germ of truth in it; his new doctrine bears precisely the same ratio to the modern collectivist public opinion that the Monroe doctrine bore the individualist public opinion. It is not my province here either to condemn or to defend the new view; I speak of it merely as indicating the radical nature of the change expressed by the new state of public opinion.

The change in national feeling did not at once become strikingly apparent. It is true that the affair in Mexico, when at the close of the Civil War Louis Napoleon endeavored to form an empire there, was carried out with aggressive decision on the part of the United States. But in that matter the position taken by the United States was in fact, if not in spirit, consistent with the Monroe doctrine; its effect was to confirm to this United States the privilege of managing its own affairs without collision with the interests of a European nation. And indeed, until we come to the affairs of Samoa and of Hawaii, all of our dealings with foreign nations since 1864 would have been justified by the general idea of the Monroe doctrine; but the spirit which inspired them may be thought to have been quite different.

First came the treaty of 1867 purchasing Alaska from Russia. Twice before had offers been made to Russia for the country, once by Van Buren and once by Buchanan;<sup>1</sup> but this had not become generally known. There was now fierce opposition when the proposition came up in the House to make the appropriation to complete the purchase, yet there was but faint suggestion that the United States had no power to acquire foreign territory.<sup>2</sup> Delano denied to the President and Senate such power, and he did so solely on the ground that it rested with Congress instead.<sup>3</sup> The only serious constitutional argument was on the question whether

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<sup>1</sup> Cong. Globe, 40th Cong. 2d Sess. 3662. Statement by Banks.

<sup>2</sup> *Id.* App. 485 (Williams). On page 135 of the Globe, Washburn took the ground that no territory could be acquired except in case of necessity. For this statement he quoted Jefferson. But for some reason this argument does not appear in his speech as revised for the Appendix, where he dwelt chiefly upon the right of Congress to withhold the appropriation.

<sup>3</sup> Cong. Globe, 40th Cong. 2d Sess. App. 452.

Congress had any right to withhold the appropriation; the opposition took the ground that a treaty requiring an appropriation of money before it could be carried out did not become a complete treaty, "the law of the land," until the appropriation had been made.<sup>1</sup> They sought in this way to establish the proposition that Congress might refuse the appropriation, and then argued that on grounds of policy we wanted no such barren and unprofitable place as Alaska.<sup>2</sup> A few made the point that Alaska was not contiguous, but this was argued as essential from the political, not from the legal point of view.<sup>3</sup> Hardly any one disapproved "expansion" (as it was now usually called) in general, but only in this particular case. On the other side we hear the change unmistakably. Precedent was not broken with only because it was not necessary to do so; the expulsion of Russia and the checking of England were in line with the policy of removing European affairs from this hemisphere;<sup>4</sup> but this was not the sole motive in the general feeling of aggressiveness. Stevens of Pennsylvania said, "The vastness of the nation is very often the strength of the nation."<sup>5</sup> Others wished to prepare for the time when the United States and Russia should be the two great world powers;<sup>6</sup> and Mr. Mullins<sup>7</sup> with true Hibernian impetuosity took for his motto the Anglo-Saxon race and the Bible, and wanted Alaska "because the American nation in its mighty march onward will have it; I want it peaceably if we can; never forcibly if it can be avoided."

Perhaps these instances misrepresent the general attitude of the House; but it is significant that a party large enough to make itself felt professed such opinions. We are now wholly in the realm of politics—not again until the last year was our constitutional question mooted. But the politics of these thirty years must be touched upon as illustrating the tightening of the grasp of collectivist ideas around our throats. A treaty was negotiated by Seward for the purchase of the island of St. Thomas from Denmark.

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<sup>1</sup> Cong. Globe, 40th Cong. 2d Sess., 1870, 3621, 4053 (Wood, Loughbridge, and Schenck).

<sup>2</sup> Cong. Globe, 40th Cong. 2d Sess. 3807. App. 392 (Loan and Washburn, *inter alios*); App. 380 (Price); App. 473 (Cullom).

<sup>3</sup> Id. App. 377 (Shellabarger); App. 400 (Butler, also protesting against further extension of American citizenship).

<sup>4</sup> Cong. Globe, 40th Cong. 2d Sess. 3661 (Myers); App. 385-387 (Banks).

<sup>5</sup> Id. 3660. (See also on the same page Donnelly, and App. 388-389, Banks.)

<sup>6</sup> Id. 3659 (Mungen).

<sup>7</sup> Id. 3669.



While the matter was pending the unlucky island was afflicted by a hurricane, a tidal wave, and an earthquake, all in one year, — enough to shake the will of the most ardent expansionist. One cannot wonder that there was little opposition in the House to Washburn's resolution protesting against further purchases of territory.<sup>1</sup> The treaty long hung fire, and finally fizzled out. More active was the proposition for a protectorate over Hayti and San Domingo in 1869, — not in itself a serious departure from the ideas of Monroe and Adams, but calling forth remarks about our manifest destiny, which Spalding thought was to embrace Hawaii,<sup>2</sup> and Robinson extended to Ireland;<sup>3</sup> Butler stated reasons to himself seemingly conclusive why we had outgrown the ideas of the father of his country.<sup>4</sup> The House resolution extending the protection of the United States over the island was defeated in the House; but the agitation was not without its effect. In spite of our leniency with Spain in regard to the "Virginius" affair, we began to take a more active interest in Cuba; and the concessions made by Spain to the Cuban rebels in 1878 were due to some extent to our pressure. Then we got a foothold in Samoa, very tentatively, but suggestively; the Venezuela matter also was aggressive. In all of these cases except Samoa the action of our government was in the letter well in accord with the idea of 1820. But the tide was flowing in a different direction, although in these cases it accomplished the same results.

The events of the last few years are too recent to require comment. Spain's promises made to the Cubans in 1878 were broken, and in 1895 rebellion broke out anew.<sup>5</sup> Mr. Cleveland contented himself with protesting, but intimated that under some circum-

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<sup>1</sup> Passed the House November 25, 1867, Cong. Globe, 40th Cong. 1st Sess. 792. "*Resolved*, That in the present financial condition of the country any further purchases, of territory are inexpedient, and this House will hold itself under no obligation to vote money to pay for any such purchase unless there is greater present necessity for the same than now exists."

At this time the treaty purchasing Alaska had been completed, although the appropriation had not yet been made. It was generally understood that this resolution was directed only against St. Thomas.

See Pierce, *Life of Sumner*, iv. 328, 329, 613-624.

<sup>2</sup> Cong. Globe, 40th Cong. 3d Sess. 333, 334.

<sup>3</sup> *Id.* 336.

<sup>4</sup> Cong. Globe, 48th Cong. 3d Sess. 336. His speech is striking in comparison with his speech on the Alaska Treaty, *ante*. See also the speech of Banks, chairman of the House Committee on Foreign Affairs, at p. 317.

<sup>5</sup> Lodge, *The Spanish-American War*, Harper's Monthly, xcvi. 449.

stances we might do more than protest. Mr. McKinley came in pledged to the relief of Cuba. The oppression of the reconcentrados, the De Lome letter, the blowing up of the "Maine," lighted a fire which no reason could put out. The followers of the doctrine of Monroe and Adams saw a chance for a foothold in Cuba, and an opportunity to push Spain away from this hemisphere, — which was indeed the passive Monroe doctrine turned active. The same men talked of how Spain had become a nuisance; but this was not legally conclusive, and only served as a mask for other thoughts. With these joined the adherents of the new ideas, who wished a foreign policy for its own sake, for the sake of ourselves, or for the sake of the Cubans; these showed on the one hand the selfish phase and on the other the altruistic phase of aggressiveness. War began and ended, and the object of desire grew from a foreign policy to foreign possessions, — for their own sake, for the sake of ourselves, or for the sake of the people of those new possessions.

The middle of the summer saw the admission of Hawaii. The affair had long been brewing: Mr. Harrison had negotiated a treaty which was withdrawn by Mr. Cleveland. A new one was soon arranged. But the islands were finally annexed by joint resolution; they were not, like Texas, admitted at once as a state, but were incorporated in the Union.<sup>1</sup> Porto Rico and the Philippines are ours by treaty, but for the first time there is as yet no provision or legislative act making them a part of the United States as a sovereign, and their status remains unsettled.<sup>2</sup> I will not digress upon the subject of their government. Suffice it to say that constitutional objections have been made to their acquisition. It has been said again that territory cannot be acquired without the consent of the inhabitants, or unless they are capable of receiving republican institutions, or unless the territory is geographically near to us.<sup>3</sup> These arguments are by the more conservative men, who look upon the spirit of the past as a part of the constitution. The other side carried the day; they insisted on the constitutional power to acquire any territory whatsoever. Whether the constitution is violated or not is a serious question. At all events it is a stern fact that the acquisition of the Philip-

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<sup>1</sup> 30 Stat. 750.

<sup>2</sup> 30 Stat. 1754.

<sup>3</sup> A collection of the authorities would be unprofitable. In regard to Hawaii the opposition was well represented by Senator Morrell, and in regard to the Philippines and Porto Rico by Senator Hoar. The majority were well represented by Senator Lodge, and by Senator Platt of Connecticut.



pires (if, as seems probable, it is a permanence) is, for reasons which cannot be explained except as a break with the past, — a change.

The bearing of this change in national public opinion upon our constitutional law is important. If we understand it we can analyze all the talk which we have heard in the past and in the present, and can tell how much of what has been called law is really law and how much of it is really politics. In this search we may recur to the rule already laid down as fundamental: A constitution must not be construed as prohibiting changes in public opinion, for a constitution which should attempt to do this would be a failure. Public opinion is indeed to be considered in construing the meaning and scope of actual constitutional provisions, but it should not be used to impose restrictions upon the sovereign powers of the nation when none are expressed.

Let me illustrate what I mean from another branch of the law. In construing the phrase "due process of law," it is permissible to look at public opinion in 1788, and to find that the Mill Acts were universally looked upon as a proper exercise of legislative power; it is then proper to say that these Mill Acts, although they sometimes amounted to a deprivation of property, were in a true sense "the law of the land," "due process of law." But when we find that the convention looked upon all retrospective laws as very improper, we cannot for that reason make a clause out of whole cloth and import it into the constitution, just as if it had expressly said, "Congress shall pass no retrospective laws."

The relevance of this consideration will presently appear. Two ways only that have been employed for acquiring territory have been seriously questioned. The first is the treaty-making power, and we inquire whether this is a legitimate means. Here again we have recourse to public opinion as our interpreter, and we find that at the time when the constitution was framed a treaty — using the word broadly, as including all compacts between nations — was by far the most common method for transferring territory from one nation to another. It would be wrong then to suppose that the constitution did not confer upon the sovereign which it created all the recognized attributes of the treaty-making power. Can a treaty not only acquire territory but incorporate it as a part of the sovereign nation? With the reservation that the territory could not thus be directly admitted as a state, there is no reason to doubt that the treaty power is adequate. By treaty Scotland became a

part of Great Britain, and Alsace-Lorraine a part of Germany; why not Louisiana a part of the United States?

The next inquiry is in regard to the limitations, if any, upon the territory that may be so acquired. It is said that it must be contiguous. It is true that all through the era of individualism only contiguous territory was looked upon as eligible; but here we must draw the line between law and politics, and not imply a limitation upon the recognized scope of the treaty-making power merely because of the unexpressed opinion of the framers. It is said that the country taken must be susceptible of a republican form of government, sympathetic with our ideas, and capable of receiving statehood. All this is good advice to those who make treaties, but it is not a part of the constitution. And the same answer is to be made to the argument of John Quincy Adams, recently repeated with so much ability and earnestness by Senator Hoar, that no country can be taken without the consent of the governed. The Declaration of Independence well expressed the opinion of the time, but that document no more than the public opinion itself is a part of the constitution. It is useful as interpreting the clauses of the constitution, but it cannot itself create a clause or a limitation. And it was too well recognized a fact that treaties as well as wars were often made without the consent of the inhabitants of a particular part of a country, for us to suppose that the force of a treaty was made to depend upon the wish of the people negotiated about.

All of these arguments in short are merely the offspring of the reasons which justified the acquisition of territory in the eyes of the people of a particular time. All are fostered by the fundamental idea of individualism but individualism is not a part of the constitution.

In this connection it is worth noting that the prevailing opinion in 1788 as to the use of a constitution did not require a panacea for all bad legislation, and the general attitude of the people in favor of putting only a few fundamental limitations upon Congress — almost none except to regulate dealings with the states — leads one to suppose that no limitation upon the treaty-making power was intended when none was expressed. The modern conception of a constitution in the present collectivist movement is wholly different; as the legislature is expected to regulate every walk of life, so modern constitutions are expected to regulate every piece of bad legislation. It was not so in 1788, and in constru-



ing our Constitution this matter is to be constantly borne in mind.

So far as we can derive any assistance from the decisions of the Supreme Court, the view that the treaty-making power is unlimited in scope is fortified.<sup>1</sup> The question naturally enough has never been directly decided; after annexation has once taken place the matter becomes so decidedly a matter of politics that there is hardly place for independent judicial consideration. But the court has repeatedly discussed and upheld laws passed by Congress for the government of territory when acquired; and in upholding the legislation the propriety of the acquisition is necessarily taken for granted. By way of *dictum* the power to acquire territory by treaty is assumed as a matter of course; and from the Federalist Marshall to Democratic Taney no hint can be found of any limitation upon the power.

Annexation of territory by joint resolution remains to be dealt with. Hardly a decision of a court has passed upon this matter even incidentally. Texas was at once admitted as a state, and the court had no chance to pass upon the validity of territorial acts for its government. Yet every case which assumes the binding force of revenue laws or other United States statutes in Texas assumes the rightfulness of Texas's admission, and every case supporting an act of Congress for which a representative of Texas voted. The same is true of the cases which affirm the right of Texas to sue and be sued in the United States courts.<sup>2</sup> But such cases are of little value; the political nature of the question practically forced upon the courts their position. Historians of ability have main-

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<sup>1</sup> This statement will be found to be borne out by reference to the following cases: *Séré v. Pitot*, 6 Cranch, 332; *Loughborough v. Blake*, 5 Wheat. 317; *American Insurance Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, 9 How. 235; *Fleming v. Page*, 9 How. 603; *Webster v. Reid*, 11 How. 437; *Clinton v. Englebrecht*, 13 Wall. 434; *Reynolds v. United States*, 98 U. S. 145; *National Bank v. Yankton*, 101 U. S. 129; *Murphy v. Ramsay*, 114 U. S. 15; *United States v. Kagama*, 118 U. S. 375; *Callan v. Wilson*, 127 U. S. 540; *Church of Latter Day Saints v. United States*, 136 U. S. 1; *Jenes v. United States*, 137 U. S. 202; *Duncan v. Navassa Phosphate Co.*, 137 U. S. 647; *Cook v. United States*, 138 U. S. 157; *In re Ross*, 140 U. S. 453; *McAllister v. United States*, 141 U. S. 174; *Shiveley v. Bowlby*, 152 U. S. 1; *American Publishing Co. v. Fisher*, 166 U. S. 464; *Springville v. Thomas*, 166 U. S. 707; *Thompson v. Utah*, 170 U. S. 343.

It is only due here to acknowledge my indebtedness to Professor Langdell, Professor Thayer, and Mr. C. F. Randolph, whose articles may be particularly consulted in 12 HARVARD LAW REVIEW, pages 365, 464, and 291, respectively.

<sup>2</sup> *Texas v. White*, 7 Wall. 700; *United States v. Texas*, 143 U. S. 621.

tained that the exercise of the power by Congress is unwarranted, but their arguments on the whole are unconvincing. Granted that two of the grounds on which the power is claimed are unsound, a third is difficult to refute. The power, as has already been shown, cannot properly be claimed under the express provision for the admission of new states. Nor can it be asserted as an attribute of sovereignty which would be lost to the nation if Congress did not exert it. The answer to the last argument is that the treaty-making power is strong enough to carry out alone any such act of sovereignty. And yet on a third ground the power of Congress may be justified, for it cannot be said that the annexation of territory is not a legislative act. If the annexation required a treaty with a sovereign nation from which the territory came, Congress might not be able to cover the entire ground; but no such case has yet arisen. To deal simply with the cases so far, Congress annexed the whole of Texas and the whole of Hawaii, and no other sovereignty could object. So far as other nations were concerned it was as if Congress had voted to take possession of an unoccupied and unowned desert. Regarded as a legislative act the only limit upon its exercise is that it shall be used for one of the ends for which Congress is expressly authorized to legislate. It may be that Texas and Hawaii were not taken for one of these ends; but if the question should come up in the courts to-day (granting that the courts should consent to consider a question of so political a nature) they would undoubtedly hold the legislation valid. Congress would properly be given the credit of wide discretionary power; and in no case hitherto could it be properly said that annexation was so remote from any permissible end of legislation — regulation of commerce, for instance, or provision for defence — that it could not have been a "necessary and proper" means to that end.

The conclusion then is that as a mere question of power there is no restriction upon obtaining territory by treaty; and upon the obtaining of territory by joint resolution, the only limitation is that it shall be a proper piece of legislation. The constitution created within its sphere a complete sovereign; and although the sovereign powers, including the power to pass laws for specified ends, the power to make war, and the power to make treaties alike, may be used unadvisedly and unjustly, there are no constitutional restraints upon such use. I have believed that they have been so used during the past year; but I shrink from befogging



the issue, which is moral, by contending for an improper view of the legal power of the United States. In the heat of a legal argument one is apt to conclude "this is legal, therefore it should be done;" forgetting that "it is wrong, therefore it should not be done." And the great changes in public opinion, eliminated from the law and considered by themselves, deserve our gravest thought. Those who are to the fullest extent in touch with the prevalent aggressive ideas should count the cost, and remember that in taking the Philippines we can hardly escape the doctrines of the balance of power which we avoided seventy years ago. Those who are looking a little less high, and hope for an empire in this hemisphere independent of European domination, should remember that if once we put ourselves in competition with the powers of Europe in the East, the powers of Europe will not allow us to continue here to enrich ourselves uninterrupted. Those who believe as I do that our first duty is to govern ourselves, that the general doctrines of individualism are being unduly slighted, and that our form of government must first justify itself at home before we take upon ourselves further burdens, see in our present course cause for disquiet. Yet pessimism is abhorrent; and it cannot be doubted that a nation, like a man, is greatest, not when its experience is limited by artificial restraints, but when through experience, through suffering, and, if it must be, through wrong, it has reached to higher things. At all events these are political matters, so grave that they would submerge any Constitution; and whatever side one takes, it may be questioned whether he strengthens his position by calling to his support forced doctrines of constitutional law.

*John Gorham Palfrey.*

BELMONT, MASS., JULY 1, 1899.

# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

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THE CONSTITUTION AND HAWAII. — Two recent cases before the Supreme Court of the Hawaiian Islands decide, in effect, that the Constitution of the United States is not to-day in force in Hawaii. The report of both cases may be found in "The Pacific Commercial Advertiser" (Honolulu) of June 10, 1899. In the first, *Peacock v. Hawaii*, it was held that the custom duties of Hawaii in force before annexation could be collected, in spite of Article I. §§ 8 and 9, of the Constitution; in the second, *Hawaii v. Edwards*, that a felon may be convicted, as permitted by the Hawaiian statutes, by nine jurors and without a petit jury, in spite of the fifth and sixth amendments to the Constitution. The course of reasoning of the court may be summarized as follows: The Constitution was not extended to Hawaii by the Joint Resolution of annexation. Whether or not the Constitution is ultimately applicable to it *ex proprio vigore* it does not necessarily apply immediately on acquisition. The power to acquire territory carries with it, as a necessary incident, the power to continue in force the laws of the territory acquired during a transition period before complete incorporation into the United States. Such an incident is practically a necessary one, without which the power to make acquisition may often be crippled — and it cannot be assumed that the Constitution intended such a result. Further, this temporary period has not, in the present cases, extended beyond a reasonable time — and even if it had, the question would be a political one with which the courts would have nothing to do. The opinions suggest a slightly different form of argument which presents their view perhaps more plausibly. If the United States should, by treaty, acquire territory on the express condition that

the Constitution should not apply until Congress should see fit, it can scarcely be contended that there is anything in the Constitution which would invalidate that condition. And there is no essential difference between that case and the present situation in Hawaii, though Hawaii was annexed by joint resolution. As the court frankly state, "While the actual decisions may be generally accounted for on other grounds, and while the *dicta* are not always consistent and not always favorable to the proposition," the principle on which the two cases are decided seems in accord with the prevailing view.

The result and the general doctrine seem equally satisfactory. A transition period very similar to the one decided for Hawaii existed in fact for Louisiana at the time it was added to the United States. Such a period will, almost undoubtedly, be fortunate, at least so far as it extends to such of our new possessions as are like the Philippines; it will relieve a partially civilized people from the burden of a constitution which is at present obviously unsuited for them and enable the national government to build up — with a much freer hand — an efficient colonial system. The whole question is essentially a political one. It seems probable that national policy will require that transition period to extend indefinitely, that any judicial interference would be most ill-advised.

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PART PERFORMANCE OF ULTRA VIRES CONTRACTS. — Indiscriminate use of the term *ultra vires* has caused confusion as to the liability of corporations in contract. By clearing the ground of *dicta* based on contracts improperly called *ultra vires*, a recent decision has reached results at least logical. *National Home Building and Loan Association v. Home Savings Bank*, 54 N. E. Rep. 619 (Ill.). The defendant corporation contracted for an exchange of building lots, and as part of the consideration agreed to assume a mortgage in favor of the plaintiff on the lot received. The plaintiff filed a foreclosure bill and asked for a deficiency decree against the defendant on its contract with the original mortgagor, who was also made a party. The defendant did not oppose the foreclosure, and offered to return the lot to the mortgagor, but denied personal liability on the mortgage. The court held that since the contract was beyond the chartered powers of the corporation, no claim could be founded on it.

In cases like this there has long been a remarkable conflict of authority. In most jurisdictions, though enforcement of *ultra vires* contracts still wholly executory has been refused, yet where the corporation has received the benefit of performance by the plaintiff, as in the present case, an action has been allowed. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Camden Ry. Co. v. Mays Landing Co.*, 48 N. J. Law, 530. It had generally been supposed that the law of Illinois was in accordance with this doctrine. *Eckman v. Ry. Co.*, 169 Ill. 312. The principal case is, therefore, an unexpected accession to the cases which take the opposite view. *Central Transp. Co. v. Pullman Co.*, 139 U. S. 24; *Davis v. Old Colony Ry. Co.*, 131 Mass. 258. These cases hold that since a corporation, within the limits of its charter, is privileged beyond individuals, it is against public policy to let it extend that sphere of privilege, — that *ultra vires* contracts are, therefore, always unenforceable.

When carried to its logical extreme, as in the principal case, this doctrine would seem at times to work unnecessary hardship. Courts may



well hesitate to be so strict, since much doubt may be cast on the so-called public policy on which it is founded. The interest of the public is no longer a unit. When corporations were few it was fair to give predominance to the interest of individuals competing with them. Since corporations now are many, the interest of those who contract with them seems at least as important to the public as the interest of individual competitors. The remedy in quasi-contract is not always sufficient to accomplish justice, since the plaintiff may be damaged by loss of the contract more than the defendant has actually gained. On the other hand, it seems impossible to make an exception in these cases on grounds of estoppel, for if public policy forbids the defendant to bind itself by words of contract, the same should be true of words of representation. The only logical ground for holding a corporation in these cases is by going to the opposite extreme and declaring that only the State can assail an *ultra vires* contract. 9 HARVARD LAW REVIEW, 255. This, however, prevents a corporation from rejecting a contract still wholly executory. Perhaps the only solution of this difficulty is to make an arbitrary exception on grounds of justice in cases where the plaintiff has fully performed his part.

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PRIVILEGED COMMUNICATION. — In the case of *Caldwell v. Story*, 52 S. W. Rep. 850 (Ky.) the court passed upon the question of privilege in an action for libel. A note had been sent for collection by the plaintiff's agents through an intermediate bank to the Bank of Albany. The defendant, who was the payor, having refused to pay, the cashier endorsed upon the paper, "Never signed a note; fraud, forgery," and returned it through the intermediate bank. The endorsement was intended to give the reasons assigned by the payor for non-payment. It was shown to be a local custom to endorse notes with reasons for non-payment. The court held that the communication was privileged.

The true theory of privilege seems to be in the nature of an exception to the general right of every individual to an untarnished reputation. Under special circumstances, it is proper to relax the rigidity of the rule; for example, when one may protect himself or aid another only by remarks derogatory to a third person. But in such cases the general rule of liability is merely suspended with reference to the parties in interest. The established rule which is stated by the court "that any communication made in good faith upon any subject in which the person has an interest, or with reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged," is wholly consistent with the general theory. *Harrison v. Bush*, 5 E. & B. 344. But the court does not mention a consideration equally important that when the defendant makes a statement to protect his interest it must be clear that he was compelled to make it defamatory, and that he kept its publication within due bounds. If he go further than is necessary he should not be allowed the privilege. *Odgers, Libel and Slander*, 3d ed., 251, 260.

Clearly, therefore, extensions of the rule should be guarded. The principal case, however, goes far towards widening the group of persons with reference to whom publication may be privileged. Here the note with its endorsed statement went through the hands of persons employed by agent banks, and it can hardly be said that the statement was not communicated to them. If the number of intermediate agents be multi-

plied, thus involving an increase of those who get knowledge of the writing, the principle which the court applies must remain the same. This possibility suggests the cases which have refused to extend this privilege when the manner of sending involved too wide publication, as sending by postal card, *Robinson v. Jones*, 4 L. R. Ir. 391; or by telegram, *Williamson v. Freer*, L. R. 9 C. P. 393. The decisions in both cases were influenced by the necessity for care in extending the sphere of publication. In the case of *Boxsins v. Goblet Frères*, [1894] 1 Q. B. 842, a communication was held to be privileged where the publication was to copying clerks in the office of the defendant, a solicitor, in view that copying letters was necessary and usual in the business. But that may be distinguished from the present case, for here the clerks were not in the defendant's employ either at his place of business or elsewhere. Moreover, it seems difficult to justify what the defendant here did as necessary and usual in the business. It is true that the local custom was shown, but even that cannot alter the fact that many whose interest in the matter was extremely small got knowledge of the objectionable writing. There is at the same time no hardship on the defendant in refusing this justification, for he may still avail himself of custom as far as the real necessity of the case demands. Hence one may well disagree with the opinion in holding this a privileged communication.

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RESERVATIONS AND EXCEPTIONS IN A DEED. — The law in this country on the reservation of easements in deeds of land is much confused and still remains in doubt. As the conveyances here are almost always by deeds poll and not by indenture, the English doctrine of a grant back of the easement strictly would not apply. Our courts have usually surmounted this difficulty by calling the reservation an "exception," appearing to consider the grantor's title as a bundle of rights, and that one of these — the easement in question — was retained by the grantor. An easement, however, has always been regarded by the common law as something newly created by the parties and entirely different from any of an owner's rights over his property. Accordingly a more consistent doctrine would be secured if, instead of trying to bring the reservation of an easement under the head of an exception from the grant, the courts recognized that the prevailing custom can only be supported on the ground of long usage.

The authorities on this subject are elaborately discussed in *Smith et al. v. Furbish*, 44 Atl. Rep. 398 (N. H.). In 1865, A, the plaintiff's ancestor, conveyed to B a tract of land along the bank of a river, reserving the right of building a dam across the river at any point and the right of flowage caused by the dam. The defendant contended that as there were no words of limitation in the reservation A only reserved a life estate in the easement. The court gave judgment for the plaintiff, holding that these reservations must be construed as exceptions, and hence words of limitation were unnecessary. If the easement is to be construed as an exception there would seem to be no necessity for words of limitation, — the grantor retaining part of his old estate, it is in him of the old right unless the contrary appear in the deed. The courts, while apparently agreeing with the principal case on this point, are not unanimous as to what shall be called an exception. Though the view of the principal case that all reservations may be construed as exceptions in order to give



effect to the intention of the parties appears to be prevailing, yet the later Massachusetts cases hold that for the easement reserved to be construed as an exception it must have been used by the grantor before the grant. *Cluslin v. Boston & Albany R. R.*, 157 Mass. 489. Why such usage should affect the subject is difficult to comprehend. The principal case would in Massachusetts therefore have to be supported on the theory of an implied grant, and, there being no words of limitation, the grantor would be held to have had only a life estate in the easement, and the plaintiff, his heir, would have accordingly failed.

THE PROTECTION OF COPLEY SQUARE. — The Supreme Court of Massachusetts in upholding the constitutionality of a statute which limited the height of buildings bordering on Copley Square would seem to have reached a just conclusion. Copley Square is a public square or park surrounded by a notable group of structures of a public or quasi-public nature. The statute in question prohibited the erection of buildings to a height of over ninety feet on the streets adjoining the square. At the time of the passage of the act the defendants were in the course of erecting a high apartment house on a corner which abutted on the square. Subsequently they built beyond the prescribed height, and to an action by the attorney general set up the defence that the statute was unconstitutional. It was held that the statute, which created an easement over adjoining property in favor of a public park, tended to promote the beauty of the park and to prevent unreasonable encroachments upon the light and air previously enjoyed; hence it came within the power of eminent domain. *Attorney General v. Williams*, 55 N. E. Rep. 77 (Mass.).

The court said that this statute might well have been passed in the exercise of the police power, but the fact that it provided compensation for property owners damaged thereby seemed to show that the legislature intended it to come under the power of eminent domain, the taking of rights in property for the use of the public and compensating the owner of such property for his injury. The decision seems correct whichever ground be taken. The right to impose reasonable restrictions for the benefit of the neighborhood as to the nature and use of buildings in a city is unquestionably within the police or regulating power. *Watertown v. Mayo*, 109 Mass. 315; *Talbot v. Hudson*, 16 Gray, 417. So under the right of eminent domain it is settled law that the legislature may take land in a city for a public park and expend public money upon its improvement. *Shoemaker v. U. S.*, 147 U. S. 282; *Foster v. Commissioners*, 133 Mass. 321. The creating of an easement over land adjoining a park is of an entirely similar nature. Whether the decision be rested upon the one ground or the other depends mainly upon the point of view that is taken. Yet the provision for compensation to the property holder damaged does not conclusively show that the statute was based on the right of eminent domain. As in the exercise of the police power the legislature may, if it sees fit, provide compensation, and justly. On the whole, it would seem better to class it under the police power, the right of regulating or restraining the use of one's property so that it shall not be injurious to the equal enjoyment of others. *Commonwealth v. Alger*, 7 Cush. 53. For the object of the statute is rather the regulation of an individual's use of his property than the appropriation of such property for a public use.

RE ARREST AFTER BAIL IN ADMIRALTY. — A decision of considerable importance to American ship-owners has just been handed down by the English Court of Appeals in *The Gemma*, [1899] P. D. 285. A foreign vessel collided with another, and on arriving at an English port was arrested in a suit *in rem*. Bail was given for the entire value of the ship and freight and she was released. Damages were assessed at an amount exceeding the bail, and when the ship later arrived at another English port she was re-arrested. It was held, reversing the decision of the lower court, that in an action *in rem* where the owner had appeared the damages were not limited to the value of the *res*, and that the ship was rightly re-arrested. The decision is based on a discussion by Sir Francis Jeune in *The Dictator*, [1892] P. D. 304. It is, however, *contra* to a series of decisions by Dr. Lushington and to a *dictum* of Baron Parke. It is of course true that England in its admiralty system followed the ancient Roman law, and never adopted as part of its customary law the continental doctrine of limiting the liability to the value of the ship and freight. And there seems to be no doubt that, as was urged in *The Dictator*, *supra*, the action *in rem* was given, not for the purpose of limiting the owner's liability but for the plaintiff's security. One may, however, admit that the action *in rem* was introduced for this purpose, and still contend that if the plaintiff chooses to proceed *in rem* he must work out his remedy through the *res* alone, on the ground that the whole nature of the proceedings are inconsistent with the personal liability of the owner. It does not appear to be disputed that if the owner had not appeared judgment would have to be given solely against the *res*, and the position seems well taken by Dr. Lushington in *The Volant*, 1 W. Rob. 383, that the effect of the owner's entering an appearance was not to render himself personally liable, but that he is only called to protect his interest in the vessel. The point was emphasized in the principal case that the owner has always been held personally liable for costs though in excess of the value of the *res*. It may well be that by appearing and putting the plaintiff to extra expense the owner should be held liable for costs, and it still would be for his advantage to appear. This has in all the cases been distinguished from personal liability for damages, and it would seem justly.

Even admitting that the owner might, by appearing and subjecting himself to the jurisdiction of the court, be made personally liable in an action *in rem*, a personal action being in some way engrafted on the proceedings, which the nature of the action and the wording of all the proceedings would seem to refute, the court might well have held that the *res* could not be re-arrested. For all the purposes of the present decision the bail represents the ship, and when she is released on bail of her full value she is altogether released from that action. *The Kalamazoo*, 15 Jurist, 885. Re-arrest after accepting bail seems almost bad faith. The court appear to have been largely influenced by the common law doctrine of the master's unlimited liability for his servants' torts, and were unable to see any practical distinction, after once holding the owner personally liable, between the re-arrest of the *res* and the arrest of another ship belonging to the same owner to compel payment of the judgment. As the entire sense of the mercantile community is in favor of limiting the liability to the value of the ship and freight, the court might well have followed the previous authorities, especially as in the decision in *The Dictator*, on which the court here relied, the present case was expressly excepted.



**RIGHT OF ENTRY FOR CONDITION BROKEN WITHIN THE RULE AGAINST PERPETUITIES.** — A right of entry for condition broken is within the operation of the Rule against Perpetuities. At last that point has been directly passed on by an English court. *In re The Trustees of Hollis' Hospital and Hague's Contract*, [1899] 2 Ch. D. 540. There one Hollis by lease and release conveyed property in 1726 to trustees upon trusts for a hospital. The release contained a proviso that if the premises should be used for any other purposes they were to revert immediately to the right heirs of Hollis. In 1898 a contract was made by the trustees to sell part of the property so conveyed, and the purchaser contended that a good title could not be made because of the condition contained in the original release. The court, however, held that this was an express common law condition subsequent, that as such it was void as a perpetuity, and that, therefore, a good title could be passed. The views of Lewis, Sanders and Gray were sustained, and that of Challis rejected. As a matter of authority in England two *dicta* are to be found on the point; they suggest, in line with the present case, that such a future interest may well be within the Rule against Perpetuities. *Re Macleay*, L. R. 20 Eq. 186; *Dunn v. Flood*, 25 Ch. D. 629. In the United States, while there is practically no decision in which the objection of remoteness in a condition has been passed upon, yet there are many cases in which conditions obnoxious to the Rule have been upheld without that difficulty having been noticed at all. *Cowell v. Springs Co.*, 100 U. S. 55; *Guild v. Richards*, 16 Gray 309. The great weight of authority in this country, apparently without any consideration of the question, creates in this regard an arbitrary exception to the Rule against Perpetuities.

It is eminently satisfactory that the point has finally been carefully argued, judicially determined and a sound result reached. Where express or implied conditions were attached to a conveyance the grantor had a right to enter on breach of the condition, — this right was not dependent on tenure, and was not affected by the statute *Quia Emptores*. It has been argued that these interests are not within the Rule against Perpetuities, because they are common law interests and releasable. But common law interests may well be within the Rule, for instance the executory devise of a chattel real. And interests which are releasable are also not excluded from its operation. Great practical inconvenience must result from a doctrine opposed to the one in the present case, particularly in America, where the number of heirs from whom the owner must seek a release of this right increases greatly as time goes on. Gray, Rule against Perpetuities, §§ 299-311.

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**UNCONSTITUTIONAL LEGISLATION AS A DEFENCE.** — The liability of an officer who executes a law which is later held void is one of the unsatisfactory phases of the American doctrine of unconstitutional legislation. It is a development of an older problem: the defence to a trespass afforded by judicial process. An officer is not protected in the execution of warrants which disclose on their face their invalidity. This is not, however, limited to defects of form. An excess of jurisdiction, not dependent on some error in the previous procedure, is said to appear from the face of the document since an officer of court is presumed to know the law. This reasoning, first applied to the common law limits of jurisdiction, has been extended, in most States, to an exercise of jurisdiction

given by unauthorized local ordinances and statutes later held unconstitutional. And so, although it is admitted that a judge of a superior court is not liable for any judicial utterance, subordinate justices, sheriffs and even public prosecutors have been held liable for enforcing mandates of legislative bodies. *Kelley v. Bemis*, 4 Gray, 83; *Merritt v. St. Paul*, 11 Minn. 223; *Warren v. Kelley*, 80 Me. 512. A few States, however, have repudiated this doctrine. *Edes v. Boardman*, 58 N. H. 580; *Brooks v. Mangan*, 86 Mich. 576. The reasoning of this latter case was recently affirmed and applied in defence of a public officer who procured issue of process under an ordinance which the court held invalid. *Tillman v. Beard*, 80 N. W. Rep. 248 (Mich.).

In continental Europe the need of decisive executive action in States surrounded by enemies gave rise to a distinct system of administrative law for the protection of such officials. England, however, since freer from external pressure, developed no such system. In this country, though it is thought that the foundations are being laid for a national administrative law, as yet it has not been generally recognized. The problem of unconstitutional legislation, however, is peculiarly our own, and it may be suggested that old precedents derived from England should not prevent our working out in this case some system of administrative protection.

It would seem, moreover, that a distinction may be drawn between those early decisions and the principal case. The reason for the original doctrine that an executive officer is liable for excess of jurisdiction was the danger of abuse of official power. From unconstitutional laws, however, our danger is not abuse of process, but abuse of legislative discretion. It is, moreover, not unfair to hold that officers are bound to know the extent of their jurisdiction at common law; but to say they must know the true limits of the authority of a legislature is to demand an impossibility. The maxim that "ignorance of law excuseth no one" is here inapplicable. The officer does not rely on the statute as law, but on the statute as a fact,—as an order or declaration of a body which he is bound to obey. To reply with the fiction that such statute is as if it never had been is a confession of weakness. Overruling an act of legislature is a decision to be made with reluctance even by a co-ordinate department. It would be, therefore, highly unbecoming in a subordinate official to deny validity to a statute. To compel him to such a decision is to abandon a cardinal principle of constitutional interpretation. In view of these objections, one would think that the liability attached to officers who exceed their common law jurisdiction should not be extended in this country to express statutory additions to their jurisdiction in which the legislature has exceeded its powers.

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## RECENT CASES.

ADMIRALTY—BAIL—RE-ARREST OF VESSEL.—A foreign vessel was arrested in a suit *in rem*, and bail given for the value of the ship and freight. The damages assessed exceeded the bail, and on the ship afterwards coming into an English port she was re-arrested. *Held*, that in an action *in rem*, where the owners have appeared, the damages are not limited to the value of the *res* and the ship was rightly re-arrested. *The Gemma*, [1899] P. D. 285. See NOTES.



**BANKRUPTCY — DISCHARGE OF JUDGMENT DEBT FOR SUPPORT OF BASTARD.** — A judgment had formally been entered against the bankrupt in bastardy proceedings, brought in the name of the State, adjudging him to pay a monthly sum to the mother for the maintenance of the child. *Held*, that such a judgment debt is not released by the discharge in bankruptcy. *Re Baker*, 96 Fed. Rep. 954 (Dist. Ct., Kan.).

The Bankruptcy Act of 1898, § 63 *a*, provides more explicitly than former bankruptcy acts that "all debts of the bankrupt which are a fixed liability as evidenced by a judgment" shall be discharged. The judgment debt in the principal case is within the letter of this provision, but not within the intentment. It is well established in bankruptcy law that, however general the words of the statute, a judgment for a penalty entered in criminal proceedings is not discharged. *Re Sutherland*, Deady, 416; *Spaulding v. New York*, 4 How. 21. To hold otherwise would allow the bankruptcy courts to remit penalties for crimes. In the principal case the proceedings were quasi-criminal, but the same principles should apply. It could never have been contemplated that the bankruptcy courts should discharge the putative father of the continuing obligation imposed by a judgment in such proceedings. *Re Cotton*, Fed. Cas. No. 3269. And the court in the principal case is accurate in giving a limited construction to the provision in question.

**BANKRUPTCY — PREFERENCES — ADVANCES UPON BOTH PAST AND PRESENT CONSIDERATION.** — A creditor of an insolvent banker had \$1300 on deposit with him. He then advanced \$1900 more, and received in return collateral securities to the amount of \$7000 for both amounts. *Held*, that as to \$1300 the transaction is a preference and voidable, but as to \$1900 the transfer is for a present fair consideration and valid. *Re Cobb*, 96 Fed. Rep. 821 (Dist. Ct., N. C.).

The Bankruptcy Act of 1898, § 60 *a*, provides that all preferences shall be voidable. But a transfer founded upon a present and adequate consideration is not considered a preference. *Tiffany v. Lucas*, 15 Wall. 421; *Clark v. Iselin*, 21 Wall. 360. The truly difficult question, and one on which there is a remarkable conflict of authority, arises where the security given is for both past and present advances. Many cases hold that the transaction being voidable in part must be voidable as to the whole. *Denny v. Dana*, 56 Mass. 160; *Tuttle v. Truax*, 1 Nat. Bank. Reg. 601; *Scannon v. Hobson*, Fed. Cas. No. 12,434. But other cases hold that the transaction is separable. *Ex parte Ames*, 1 Lowell, 561; *Re Stowe*, 6 Nat. Bank. Reg. 429; *Crampton v. Turbell*, Fed. Cas. No. 3349. The former cases, however, fail to recognize the distinction between a fraudulent conveyance and a preference. Now fraud is not essential to the conception of a preference. Accordingly there is no reason why the transfer should not be separated into its voidable and valid parts, as was done in the latter cases, and the decision in the principal case is to be commended.

**BILLS AND NOTES — ALTERATION — PRESUMPTION OF FRAUD.** — The payee sued to recover the consideration of a note which had been materially altered while in his possession. *Held*, that there is a presumption which the plaintiff has not rebutted that the alteration is fraudulent and hence the action will not lie. *Maguire v. Eichmeier*, 80 N. W. Rep. 395 (Iowa).

It is well settled that a fraudulent alteration of a note by the payee extinguishes both the note and the liability for which it was given. *Smith v. Mace*, 44 N. H. 553; *Wheelock v. Freeman*, 30 Mass. 165. But there is authority for the doctrine that unless the alteration is shown to have been made with fraudulent intent the payee may recover the original consideration. *Vogle v. Ripper*, 34 Ill. 100. The prevailing rule, however, is stated by the principal case. *Warder Co. v. Willyard*, 46 Minn. 531; 2 Dan. Neg. Ins., 4th ed., § 1412. It is certainly fair to call upon the party who made the alterations for all necessary explanations, but it is unnecessary and misleading to put the rule in the form of a presumption. If a note is given on account of a debt the right of action on the debt is suspended. *Kearslake v. Morgan*, 5 T. R. 513. And it seems clear that if the creditor wishes to take advantage of the original liability it is for him to show that the security has become unavailable without his fault. It is simply a question of the burden of proof.

**BILLS AND NOTES — NOTES OF UNREGISTERED FOREIGN CORPORATIONS.** — A note was executed in Tennessee, in favor of, and as part of a transaction with, an Ohio corporation which had not complied with the statutes regulating the terms on which foreign corporations may do business in Tennessee. *Held*, that the note is unenforceable in the hands of a purchaser for value without notice. *First Nat. Bank of Marshall v. Coughron*, 52 S. W. Rep. 1112 (Tenn., Ch. App.).

As the statutes in question do not expressly make such notes void, the better view is that they are enforceable by holders for value without notice. *Williams v. Cheney*, 69 Mass. 215. The principal case rests on a *dictum* in an earlier Tennessee case,

*Snoddy v. American Nat. Bank*, 88 Tenn. 573, that "notes given in consideration of a contract against morals, public policy, and public statutes are void in any hands," citing 2 Am. and Eng. Enc. Law, 1st ed., 368, and notes. The reference supports the position taken; but an examination of the cases cited discloses that they are all either based on statutes making the notes void, or are cases between the original parties to the transaction. The later edition of the Encyclopedia states the correct view. 4 Am. and Eng. Enc. Law, 2d ed., 192. The principal case illustrates the danger of relying on *dicta* and statements in the digests, without a careful examination of the cases.

**CARRIERS — CONTRACT LIMITING LIABILITY FOR NEGLIGENCE.** — *Held*, that a carrier cannot by contract limit his liability for injuries caused by his negligence to a value set by the shipper. *Cincinnati, etc. R. R. Co.'s Receiver v. Graves*, 52 S. W. Rep. 961 (Ky.).

Contracts purporting to limit, to an agreed valuation, the liability of the carrier for losses occurring through his negligence appear to fall into three classes. First, where the carrier prints in his bill of lading a limit to the liability assumed. Such stipulations are generally held to be against public policy and void. *Black v. Goodrich Transportation Co.*, 55 Wis. 319. Second, where the liability is limited to a certain sum, unless a higher value is stated by the shipper. Here, the authorities are in conflict, but the weight, perhaps, is that the carrier cannot limit his liability by the mere inaction of the shipper. *Southern Exp. Co. v. Seide*, 67 Miss. 609. Third, where, as in the principal case, the shipper sets a value which is written into the bill of lading. Here, clearly, there is no reason in public policy against the contract, as the shipper is not at a disadvantage in his dealing with the carrier. The agreement is virtually one for liquidation of damages, and should be enforced. *Harvey v. Terre Haute, etc. R. R.*, 74 Mo. 538.

**CONSTITUTIONAL LAW — RESTRICTION OF HEIGHT OF BUILDINGS.** — *Held*, that a statute, setting a limitation upon the height of buildings, adjoining a certain public park, and providing for compensation to property owners affected, is not unconstitutional. *Attorney-General v. Williams*, 55 N. E. Rep. 77 (Mass.). See NOTES.

**CONTRACTS — STATUTE OF FRAUDS — SPECIFIC PERFORMANCE** — Under an oral contract for the purchase of land the defendant entered into possession, paid the purchase price, and made permanent improvements. *Held*, that the case is within the Statute of Frauds, and equity will not give specific performance of the contract. *Pass v. Brooks*, 34 S. E. Rep. 228 (N. C.).

Although the Statute of Frauds is binding on courts of equity, it is the general rule that entry into possession and payment of purchase-money under an oral contract for the sale of land is such part performance as will entitle the purchaser to specific performance. *Green v. Jones*, 76 Me. 563; *Fitasimmons v. Allen's Admr.*, 39 Ill. 440; *Browne*, Stat. Fr., 5th ed., § 465. And where courts of equity recognize exceptions to the statute the erection of valuable improvements by the purchaser is decisive in his favor. *Potter v. Jacobs*, 111 Mass. 32; *Littlefield v. Littlefield*, 51 Wis. 23. The principal case represents the law of North Carolina, Mississippi, and Tennessee, the purchaser's remedy being confined to restitution of the purchase-money and compensation for improvements. *Ellis v. Ellis*, 1 Dev. Eq. 341; *Ridley v. McNairy*, 2 Humph. 174; *Box v. Stanford*, 21 Miss. 93. That such a rule will often fail to do justice between the parties seems obvious, and the results of the prevailing doctrine are far more satisfactory, though usually not reached without some violence to the words of the statute.

**CORPORATIONS — MISREPRESENTATION IN PROSPECTUS — RESCISSION OF CONTRACT.** — The defendants formed the plaintiff company and caused themselves to be elected sole directors for the purpose of buying certain nitrate grounds belonging to themselves. The prospectus gave notice of this fact but was misleading as to important particulars. The defendants greatly overcharged the company, which, in ignorance thereof, worked out but a small portion of the deposit. *Held*, that the plaintiff cannot rescind the contract. *Lagurus Nitrate Co. v. Lagurus Syndicate*, [1899] 2 Ch. D. 392.

Because of the misrepresentation contained in the prospectus the plaintiffs would have been entitled to rescind the contract before the land had been worked. A trustee or agent cannot bind his principal in a contract with himself unless he has made a full disclosure of all the facts he knows concerning the subject matter. *Ex parte Lacey*, 6 Ves. 625; *Wardell v. Union Pacific R. R.*, 103 U. S. 651. But the court, in the principal case, held that the plaintiff could not succeed because the land had been worked, and it was therefore impossible to restore the parties to their original position. The principle invoked, however, is not an absolute bar to rescission, but merely a rule by which it is determined in the first instance whether such a remedy is just. And if substantial justice will be attained, the relief sought should be given though the



parties are not restored to their original position. *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1278. Hence the opinion of a dissenting judge in the principal case seems preferable. Practical justice would be done if the defendants were put in the same position as if they had worked the land themselves. The plaintiff should then be given a decree for the purchase price of the land less the profits the company made in working it.

**CORPORATIONS — STOCKHOLDER'S RIGHT TO INSPECT CORPORATE RECORDS.** — The relator, a stockholder, applied for a writ of *mandamus* to compel the defendant corporation to allow her to inspect its records, alleging that she was desirous of learning the condition of the company and the manner in which it had been managed. *Held*, that a *mandamus* is properly granted. *State v. Pacific Brewing, etc. Co.*, 58 Pac. Rep. 584 (Wash.).

The English courts, in the absence of statutory provisions, confine the right of a stockholder to inspect corporate records to cases in which there is a dispute pending between himself and the corporation, or other stockholders, or where the purpose of the inspection is to ascertain whether he can raise a particular case in his favor. *Rex v. Merchant Tailors Co.*, 2 B. & Ad. 115. The objection to a more general right is that frequent examinations might interfere with the successful conduct of the business of the company. The English rule has been approved in some American jurisdictions. *Commonwealth v. Phoenix Iron Co.*, 105 Pa. St. 111; *People v. Walker*, 9 Mich. 328. The general tendency of our courts, however, is to permit the greatest freedom of inspection, placing practically no limit upon the right other than that the purpose shall not be the mere gratification of curiosity. *Martin v. Bienville Oil Works*, 28 La. An. 204. And when it is remembered that the most effectual remedy for mismanagement in large corporations is danger of exposure, and that the court can so regulate the mode of inspection as to avoid all practical objections to it, the doctrine of the principal case seems unexceptionable.

**CORPORATIONS — ULTRA VIRES — PERFORMANCE BY THE PLAINTIFF.** — In answer to a bill for the specific performance of a contract which the plaintiff had performed on his part, the defendant corporation set up the defence of *ultra vires*. *Held*, that this is a good defence. *National Home, etc. Assn. v. Home Savings Bank*, 54 N. E. Rep. 619 (Ill.). See NOTES.

**CRIMINAL LAW — VIOLATION OF STATUTE — NECESSITY.** — A statute, containing certain exceptions, prohibited carrying to church any intoxicating liquors. By a physician's directions the defendant carried whiskey to church to be used by his wife as a medicine. *Held*, that the defendant is liable under the statute. *Rice v. State*, 34 S. E. Rep. 202 (Ga.).

If, under circumstances which allow no possibility of choice, one is compelled to do a prohibited act, he is not punishable, for no crime has been committed. *Commonwealth v. Brooks*, 99 Mass. 434. Clearly this was not the principal case. But, in addition, it is generally held that where it is necessary to do the act prohibited in order to prevent great harm to particular persons, the commission of the act will be excused on grounds of public policy, unless the rights of an individual have been infringed. *State v. Wray*, 72 N. C. 253; *Brig William Gray*, 1 Paine, 16; *Nixon v. State*, 76 Ind. 524. In the principal case, however, a choice was not forced between a violation of the statute and endangering the life of the wife. The defendant, by going to church, voluntarily took the first step, and hence should not be allowed to claim that he was forced to break the statute in order to protect his wife. The view of the principal case is undoubtedly sound.

**DAMAGES — GRATUITOUS BAILMENT — TROVER.** — The plaintiffs were gratuitous bailees of goods which the defendants converted, there being no negligence on the part of the plaintiffs. *Held*, that the measure of damages is the value of the property converted. *Guttner v. Pacific Steam Whaling Co.*, 96 Fed. Rep. 617 (Dist. Ct., Cal.).

The great weight of authority is in accord with the rule in the principal case. *Burton v. Hughes*, 2 Bing. 173; *Suth. Dam.*, 2d ed., § 1136. It has been held, however, that the bailee is entitled to no damages when he has suffered no loss. *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. D. 422; *Lockhart v. Western, etc. R. R.*, 73 Ga. 472. The latter cases seem preferable. The bailor, where the bailment is gratuitous, can, in an action of trover against the convertor, recover the full value of the property. *Smith v. Sheriff of Middlesex*, 15 East, 607. And if the bailee in such a case recovers the full value of the goods he has gained no advantage for himself but must hold the entire sum for the benefit of the bailor. *Hays v. Riddle*, 1 Sandf. 248; 2 Sedg. Dam., 7th ed., 394. The view in the principal case thus occasions two suits in order to do full justice, where only one is really necessary. For this reason the courts might well bar all recovery by the bailee in order to prevent circuity of action.

**EVIDENCE—CONFESSION OBTAINED BY TRICK.**—The defendant confessed to murder, having been falsely led to believe that the knife with which he had committed the murder had been found. *Held*, that the confession is admissible. *Commonwealth v. Cressinger*, 44 Atl. Rep. 433 (Pa.).

The general rule is that a confession is admissible unless it has been caused by actual duress or by any inducement, threat, or promise, proceeding from a person in authority and having reference to the charge against the accused person. Steph. Dig. Ev. art. 21. Hence the mere fact that the confession was obtained by a trick or a false statement should not exclude it, though it might affect its weight. *Minnesota v. Staley*, 14 Minn. 105; *State v. Phelps*, 74 Mo. 128. Notwithstanding, the case of *Bram v. United States*, 168 U. S. 532, held inadmissible a confession induced by a statement made to the accused that he had been seen committing the crime, on the ground that the prisoner was unduly influenced. See 11 HARV. LAW REV. 408. In refusing to follow that decision, the present case is supported by the weight of authority, although of late the courts have shown a tendency to be more lenient to the accused. *People v. Barker*, 60 Mich. 277; *Commonwealth v. Myers*, 160 Mass. 530.

**EVIDENCE—HEARSAY—DECLARATIONS OF INTENTION.**—In an action to recover for loss of cattle while in transit, a statement of the engineer, made while the cattle were being loaded, that he would kill them before they reached a certain point, was introduced. *Held*, that the statement is admissible as the declaration of an agent within the scope of his authority. *Crawford v. Southern Ry. Co.*, 34 S. E. Rep. 80 (S. C.).

The court got rid of the objection of hearsay on the ground that the admissions of an agent within the scope of his authority are the admissions of the principal and so not hearsay. The correctness of this proposition cannot be doubted. *Fairlie v. Hastings*, 10 Ves. 123; *United States v. Golding*, 12 Wheat. 460. But the assertion that the admission in the principal case was within the scope of the engineer's authority may well be disputed. Although this reason fails, the result reached can be justified on other grounds. An exception to the rule against hearsay admits contemporaneous declarations bearing upon the intention of the declarant. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285; *Commonwealth v. Trefethen*, 157 Mass. 180. The statements here were contemporaneous and so come within the above exception, and were rightly admitted.

**EVIDENCE—LIBEL—PRIVILEGE.**—The cashier of a bank holding a note for collection endorsed on the note "Never signed a note; fraud, forgery," meaning to give notice to the holder's agents in the customary way of the payor's reason for refusing payment. *Held*, that the communication is privileged. *Caldwell v. Story*, 52 S. W. Rep. 850 (Ky.). See NOTES.

**INDIANS—TRIBAL LAW.**—*Held*, that the right of inheritance in land of a member of an Indian tribe whose tribal organization is still recognized by the government is controlled by the law of the tribe. *Jones v. Meehan*, 20 Sup. Ct. Rep. 1. See NOTES, 13 HARV. LAW REV. 298.

**INSURANCE—WAIVER—CLAUSE OF INCONTESTABILITY.**—The holder of an insurance policy had not an insurable interest, but the policy contained a provision that the same should be incontestable after the lapse of a year. In an action on the policy at the expiration of a year, *held*, that the holder cannot recover. *Anctil v. Manufacturers' Life Ins. Co.*, [1899] App. Cas. 604.

Public policy and expediency require that the assured should have an insurable interest in the thing insured. *Goddart v. Garrett*, 2 Vern. 269. Hence the insurer cannot waive a defence founded on the lack of such an interest on the part of the policy holder. *Agricultural Ins. Co. v. Montague*, 38 Mich. 548. Moreover, it has been held that a provision of incontestability amounts to a waiver in advance of all defences that the company can waive, *Massachusetts Benefit, etc. Co. v. Robinson*, 104 Ga. 256, and it seems fair to say that it should leave open all others. On these grounds the principal case deserves to be supported. It has been held, however, that the only effect of a clause of incontestability like that in the principal case is to establish a short period of limitation for setting up all kinds of defences, and that one who has not an insurable interest may recover after the period expires. *Wright v. Mutual, etc. Assn. of America*, 118 N. Y. 237. But, obviously, such a view leads to the sanction of wager policies and allows the general principles of public policy and expediency to be defeated by the private arrangement of the parties.

**PARTNERSHIP—DEATH OF PARTNER—SPECIAL PARTNERSHIP.**—At the death of one of two partners his executor, without his authority, consented to a continuance of the business by the surviving partner. The latter subsequently became insolvent.



*Held*, that the debts contracted in the business since his partner's death, his own individual debts, and the claim of the executor for the share of the deceased are to be satisfied *pari passu* from the assets of the business. *Dexter v. Dexter*, 60 N. Y. Supp. 371 (Sup. Ct., App. Div., Fourth Dept.).

Although the executor in the above case had no legal right to allow his testator's assets to remain in the business, it must be admitted that a special partnership was in fact formed as to third parties, since the executor's power over the assets is absolute. *Woerner, Administration*, 387. The subsequent creditors of the business should, therefore, have the first claim to the firm assets, *Hoyt v. Sprague*, 103 U. S. 613, 624, the same as when the continuance of the business has been authorized by the testator. *Adams & Co. v. Albert*, 155 N. Y. 256; *Burwell v. Mandeville's Exec.*, 2 How. 560. Of the surplus the executor should be entitled to the proportionate share of the deceased partner, and the share of the survivor alone should be applicable to the payment of his separate debts, since a creditor is entitled to no greater interest than his debtor owns. *Matter of Smith*, 16 Johns. 102; *Brown's Appeal*, 89 Pa. St. 139. The present decision is opposed to the result reached by the application of sound and established principle.

**PERSONS — ALIENATION OF AFFECTION — SUIT BY WIFE.** — *Held*, that mere alienation of the husband's affections does not constitute a cause of action for the wife, but there must be also a loss of the *consortium*. *Neville v. Gile*, 54 N. E. Rep. 841 (Mass.); *Houghton v. Rice*, 54 N. E. Rep. 843 (Mass.).

These decisions apparently require an actual separation of the husband from the home before the wife's cause of action accrues. Since the passage of statutes allowing married women to sue alone, there seems to be no reason why the wife's rights against third parties for interference with the marriage relations should not be equally extensive with those of the husband. This view is taken by the great weight of authority. *Foot v. Card*, 58 Conn. 1; *Bennett v. Bennett*, 116 N. Y. 586. It has been held in several jurisdictions that a husband may maintain an action for the mere alienation of his wife's affections without her separation from the home. *Herrmann v. James*, 47 Barb. 120; *Rinehart v. Bills*, 82 Mo. 534. The justice of these decisions can hardly be doubted, for the personal injury to the husband or wife and the violation of the security of the family relations may be just as great when the discordant element remains, as when he or she abandons the home. The principal cases appear then to be against the better policy and opposed to the trend of modern authorities. See 1 Bish. Mar. Div. and Separ. § 1361.

**PROCEDURE — EFFECT OF JUDGMENT AGAINST GARNISHEE.** — The plaintiff obtained judgment against the defendant and also against a garnishee in the same action. The defendant, having paid into court the difference between the judgment against the garnishee and that against himself, *held*, that he is entitled to have the judgment against himself discharged as satisfied. *Bowen v. Port Huron Co.*, 80 N. W. Rep. 345 (Iowa).

The proposition by which it is sought to support this questionable result is in effect that the judgment against a garnishee is equivalent to a levy on the defendant's property. Even admitting this to be true, it does not justify the decision reached, for while a levy on property sufficient to satisfy the debt may operate to suspend further remedies while it is in force, it is nowhere held that it extinguishes the judgment. *First Nat. Bank of Hastings v. Rogers*, 13 Minn. 407; 2 Freem. Judg., 4th ed., § 475. To approach the question from another standpoint, clearly it was never intended that garnishment statutes should force the party who takes advantage of them to accept the liability of some third person as a substitute for that of his debtor. The judgment against a garnishee is in the nature of collateral security for the satisfaction of the principal's obligation. It is subordinate and incidental to the judgment against the defendant, and it is difficult to find any principle by which it could become a ground for discharging his liability. *Robertson v. Norroy*, 1 Dyer, 83; 1 Freem. Judg., 4th ed., § 228.

**PROPERTY — CONDITIONS — RULE AGAINST PERPETUITIES.** — In 1726 H. by lease and release conveyed property to trustees upon trusts for a hospital. The release contained a proviso that if the premises should be used for any other purposes they were to revert immediately to the right heirs of H. *Held*, that this is a common law condition subsequent, and as such is void as a perpetuity. *In re The Trustees of Hollis, etc., Contract*, [1899] 2 Ch. D. 540. See NOTES.

**PROPERTY — COPYRIGHT — SHORTHAND REPORTS.** — The plaintiff brought an action to restrain the defendant from selling a book which contained public speeches taken from shorthand reports published in the plaintiff's newspaper. *Held*, that the plaintiff can claim no copyright in such reports. *Walter v. Lane*, 68 L. J. Ch. 736. See NOTES.

PROPERTY—DEEDS—RESERVATIONS.—A conveyed to B a tract of land bordering on a river, reserving, without words of limitation, the right of building a dam across the river and the right of flowage caused thereby. In an action by the heir of A, *held*, that the easement reserved must be construed as excepted from the grant, and that therefore words of limitation are unnecessary. *Smith v. Furbish*, 44 Atl. Rep. 398 (N. H.). See NOTES.

PROPERTY—LATERAL SUPPORT—DAMAGES.—A wharf on the plaintiff's land, which did not increase the lateral support required of the adjoining land, was injured by the digging away of such land. *Held*, that the plaintiff may recover for the injury both to his soil and his wharf. *White v. Tebo*, 60 N. Y. Supp. 231 (Sup. Ct., App. Div., Second Dept.).

It is universally held that the owner's natural right to have his land supported extends only to the land in its unimproved state. But admitting that the land in its natural state would have fallen, there is a conflict of authority as to whether the damages should include incidental injury to structures thereon. In England and one or two of the states the rule of the principal case is followed. *Brown v. Robins*, 4 H. & N. 186; *Stearns' Exec. v. City of Richmond*, 88 Va. 992. In a majority of the States, however, damages are recoverable merely for the injury to the soil, unless the injury to the structure was caused by negligence. *Gilmore v. Driscoll*, 122 Mass. 199; *McGuire v. Grant*, 25 N. J. Law, 356; *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465. The doctrine established in the latter cases is preferable, although, as a matter of legal principle, no decided advantage can be claimed for it. Public policy, however, is better served, if improvements to land are not unduly discouraged, by forcing on the owner who desires to excavate an absolute liability with regard to structures on his neighbor's land.

PROPERTY—PERCOLATING WATERS—ABSORPTION BY WATERWORKS.—The defendant, by building extensive waterworks drew off the percolating waters which fed a natural stream on the plaintiff's land, causing it to dry up. *Held*, that the defendant is liable for the damage done. *Smith v. City of Brooklyn*, 54 N. E. Rep. 787 (N. Y.).

The case establishes the law in New York that the enjoyment of percolating waters is not an absolute right. Although the court confines its decision to the exact facts of the case, the logical outcome of abandoning the doctrine of absolute ownership in percolating waters would seem to lead to the result reached in *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, that the right to use such waters should be restricted to reasonable limits. This comes nearer to practical justice than any other view. By the right of authority, however, absolute ownership in percolating waters is recognized. *Chasemore v. Richards*, 7 H. L. Cas. 349; *Chatfield v. Wilson*, 28 Vt. 49. See 13 HARV. LAW REV. 151.

PROPERTY—WILLS—ATTESTATION.—Under a statute requiring wills to be attested by two witnesses, *held*, that it is not essential that the testator sign first, if his signature and the attestation form part of the same transaction. *Gibson v. Nelson*, 54 N. E. Rep. 901 (Ill.).

In England it is well settled that an attempted attestation before the will is signed by the testator is void. *Goods of Olding*, 2 Cur. Ecc. 865; *Goods of Byrd*, 3 Cur. Ecc. 117. In this country the English rule is followed by the majority of courts. *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Chase v. Kittredge*, 93 Mass. 49. But the doctrine of the principal case is not without support. *O'Brien v. Gallagher*, 25 Conn. 229; *Rosser v. Franklin*, 6 Grat. 1; 1 Red. Wills, 226. However desirable it may be to give effect to the clear intention of the testator, the plain words of the statute should not be disregarded. This seems to have been done in the above decision, for it is in strictness an impossibility for any person to witness the future act of another, although it is so nearly contemporaneous as to be part of the same transaction. *Brooks v. Woodson*, 87 Ga. 379. On principle, then, as well as on authority the principal case seems questionable.

PROPERTY—WILLS—TESTAMENTARY CAPACITY.—*Held*, that the test of testamentary capacity is the ability of the testator to understand the nature and elements of the transaction in which he is engaged, at the time when he executes the will. *Appeal of Turner*, 44 Atl. Rep. 310 (Conn.).

Testamentary capacity was formerly a question of sanity. *Smith v. Tebbitt*, L. R. 1 P. & D. 398. A modern rule requires ability to make a contract. *Stewart v. Elliott*, 2 Mackey, 304. Still another test employed is the ability of the testator to transact ordinary business. *Meeke v. Meeke*, 75 Ill. 262. The weight of authority, however, supports the test laid down in the principal case. *Whitney v. Twombly*, 136 Mass. 145; *St. Leger's Appeal*, 34 Conn. 434; *Waddington v. Bushy*, 45 N. J. Eq. 173. This is the most logical and satisfactory view. It may be that a partially insane person can make a



will; and then again that a sane though weak-minded person cannot. A will is neither a contract, nor general business, and a man's capacity to do one particular thing cannot properly be determined by his ability in some other direction.

**PUBLIC OFFICERS — LIABILITY FOR PUBLIC MONEYS.** — A county treasurer deposited public funds in a bank, which subsequently failed. In an action on the official bond, *held*, that the obligors are liable irrespective of the treasurer's negligence. *Lamb v. Dart*, 34 S. E. Rep. 160 (Ga.).

This decision accords with the great weight of authority in holding that a public officer is subject to a stricter accountability than an ordinary bailee, and that the use of due care will not excuse him or his sureties for the loss of public moneys. *United States v. Prescott*, 3 How. 577; *Lowry v. Polk County*, 51 Iowa, 50; *Tillinghast v. Merrill*, 151 N. Y. 135. *Contra*, *Cumberland County v. Pennell*, 69 Me. 357. This view is based upon considerations of public policy, and seems justifiable in view of the great importance that public officers faithfully perform their duties. See 10 HARV. LAW REV. 126, 386; 11 HARV. LAW REV. 271.

**SURETYSHIP — RELEASE OF EXECUTION — DISCHARGE OF SURETY.** — A creditor obtained judgment against the principal debtor and sureties, and levied on personal property of the principal sufficient to satisfy the judgment. In a later proceeding, to which the sureties were not parties, the property was released. *Held*, that the sureties are discharged. *Atnip v. Tennessee Mfg. Co.*, 52 S. W. Rep. 1093 (Tenn. Ch. App.).

In Tennessee a levy on personal property vests the title in the officer making it, and, if the property seized is sufficient to satisfy the demand, the levy is in law a satisfaction of the judgment. *Evans v. Barnes*, 2 Swan, 292; *Pigg v. Sparrow*, 3 Hayw. Tenn. 144. The application of this anomalous doctrine seems to have been abandoned in cases where the property levied on has been released, and in such cases it is held that the levy does not amount to a satisfaction. *Telford v. Cox*, 15 Lea, 298. But as to whether the surety is bound in the latter case the Tennessee decisions differ. To the effect that he is discharged is *Sypert v. Frazier*, 1 Tenn. Cas. 557. The court, however, reached the opposite result in *Fry v. Manlove*, 1 Baxt. 256. If the levy, where there is a subsequent release, is no satisfaction of the principal debtor's obligation it is difficult to see why it should discharge the surety. The latter clearly has no legal defence against the creditor, and there seems to be no ground for raising an equitable defence in his favor. Therefore, with cases on either side, the decision of the principal case is to be regretted.

**TORTS — FALSE IMPRISONMENT — JUSTIFICATION UNDER VOID LAW.** — The defendant had procured the arrest of the plaintiff under an ordinance afterwards held void. *Held*, that the defendant is not liable for false imprisonment. *Tillman v. Beard*, 80 N. W. Rep. 248 (Mich.). See NOTES.

**TORTS — RIGHT TO PRIVACY.** — A cigar manufacturer used the name and likeness of a deceased person as a label for a brand of cigars. *Held*, that equity will not restrain this use, unless it amounts to a libel, though the deceased may not have been a public character. *Atkinson v. Doherty*, 80 N. W. Rep. 285 (Mich.).

This is the first American decision squarely involving the so-called right to privacy, to the support of which the law seemed at one time to be tending, and after a full discussion of the subject, it refuses to admit the existence of that right. It is in accord with a late English authority. *Dockrell v. Dougall*, 78 L. T. Rep. 840; see 12 HARV. LAW REV. 207. Together, these cases make it improbable that any court will in the future rest a decision on this ground. If the subject is to be treated at all, therefore, it is handed over to the legislatures, and, on principle, perhaps this is the desirable result.

**TORTS — UNRECORDED MORTGAGE — SALE BY MORTGAGOR.** — The defendant secured a debt to the plaintiff by a bond and mortgage on certain land. The mortgage was not recorded, and the defendant sold the premises to a third party without notice. *Held*, that an action of tort lies for the destruction of the plaintiff's security. *Conley v. Blinbry*, 60 N. Y. Supp. 531 (Sup. Ct., Special Term).

This case is novel in the form of the remedy employed, but on principle a valid objection to it cannot be raised. Clearly, the defendant in thus deliberately depriving the plaintiff of his lien upon the land has done a wrongful act, for which he should answer in damages. However permissible in theory, this form of action will not always prove valuable in practice, for the plaintiff has lost his security only, and not his debt, and if the defendant is solvent his damages will be merely nominal. But where the defendant has become bankrupt the creditor may well resort to this action, and thus have two claims upon the assets. For a discussion of an analogous line of cases, see 1 HARV. LAW REV. 7.

TRUSTS—DEPOSIT OF CHECK FOR COLLECTION—LIABILITY OF BANK.—The plaintiff deposited for collection with the defendant bank a check on another bank against which the defendant allowed him to draw. The check was lost in the clearing house before collection. *Held*, that the defendant is liable as debtor for the amount of the check. *Walton v. Riverside Bank*, 60 N. Y. Supp. 519 (Supp. Ct., App. Term).

When negotiable paper is deposited with a bank for collection the bank is regarded by the great weight of authority as a mere agent, and does not become a debtor till the paper is paid. *Scott v. Ocean Bank*, 23 N. Y. 289; *Phoenix Bank v. Risley*, 111 U. S. 125. It does not seem that the additional fact in the principal case, where the depositor was allowed to draw against the check before collection, should alter the relation of the parties. Such a permission is extended as a courtesy, and the transaction really amounts to a loan by the bank on the security of the check. The authorities, however, are about equally divided. In agreement with this line of reasoning is *Bulbach v. Frelinghuysen*, 15 Fed. Rep. 675 (Cir. Ct., N. J.). *Contra*, *Hoffman v. First National Bank*, 46 N. J. Law, 604. The view in the principal case results in making the defendant a guarantor not only of the safety of the check while in his possession or that of his agents, but also of its collectibility. Such an extreme liability should hardly in reason be imposed as a result of the nature of the transaction. *Gaden v. New Foundland Savings Bank*, [1899] App. Cas. 280; *Moors v. Goddard*, 147 Mass. 287.

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## REVIEWS.

A TREATISE ON CRIMINAL PLEADING AND PRACTICE. By Joseph Henry Beale, Jr. Boston: Little, Brown & Co. 1899. pp. xli, 400.

This latest addition to the Student Series is, as most of the preceding volumes have been, a practical book in the best sense of the word, both for the student and the practitioner. Leaving to one side the minor details of practice that depend solely on local arrangements, the book deals with the general principles of modern criminal pleading. While the book is thus devoted to a statement of the law as it is to-day, it is more than a mere annotated digest. When the point of law under discussion is clear as to its underlying principles, the illustrations and variants are stated in as concise a form as possible. Where, on the other hand, the principle is not clear, or there is a conflict in the decisions, the reason for the law, or an intimation as to which of the decisions is the sounder, is given with sufficient fulness to set the reader on the right track. Thus in the chapter on Burden of Proof the distinction is made clear between insanity, which is really a negative defence and hence one that does not shift the burden of establishing to the defendant, and a truly affirmative plea as self-defence or former jeopardy, where the burden should so shift. While the correctness on principle of these views is shown, it is also pointed out that in the case of insanity the courts are almost evenly divided, and in the case of self-defence they are almost unanimous in keeping the burden on the prosecution. Throughout the treatise citations, while rarely merely cumulative, are always given for every statement of law, and chosen from the whole field of both English and American decisions.

The subject-matter is divided into four parts with appropriate chapters. Starting with the first question that would naturally arise, that of jurisdiction and venue, the author proceeds through the various steps of the accusation and trial to the question of pardon and other bars to execution. Not the least interesting part of the work is that which discusses the present forms of indictment. Professor Beale points out that the reason for the present cumbersome and wordy forms is in large part historical, that the really necessary parts of the indictment, even when the need for



preserving to the accused the rights given him by the Constitution is considered, are comparatively few. The simpler forms that will sooner or later supersede in all States the present archaic ones are illustrated by reference to the revised indictments already in use in New York and Massachusetts.

H. A. B.

LE POUVOIR EXÉCUTIF AUX ETATS-UNIS. Par M. Adolphe de Chambrun. Revue, corrigée et augmentée avec préface de M. Pierre de Chambrun. Paris: A. Fontemoing, Éditeur. 1899. pp. xvi, 337.

This extensive monograph was first published in 1873 — about the time of the Third Republic in France — with the intention of familiarizing the French people with the system of the American executive. It is then essentially an exposition and only secondarily a critical study of our government. It has been little known in the United States, and the present re-edition is practically a re-introduction of the book. It is on the whole a sound exposition of the subject — careful, minute and admirably clear, full of historical explanation. In only one place, in regard to the function of the judicial power to adjudge legislation unconstitutional, is positive error noticed. The defects of the book are the seemingly almost insuperable ones which beset a continental writer who deals with the American or English systems of government. The author shows a constant tendency to attribute the form of the executive power far too much to abstractly rational ideas, to reduce to formulæ, to “neglect what he cannot express neatly,” — or from the other aspect, he failed to comprehend completely the flexibility of our institutions, he put too little emphasis on the growth of the power of the central government and felt too little the power of the states; his system of checks balances over nicely, he missed the rough-hewn, elastic quality of the system.

Another Frenchman writing a few years later, Boutmy in his “*Études de Droit Constitutionnel*,” pointed out most acutely the often illogical and seemingly unworkable nature of parts of our system, but he appreciated another fact, that these clumsy parts of our machinery were often perfectly serviceable. It is just that sort of thing that Chambrun failed to do, and on the whole his book teaches us little. Yet in this very abstract rationalism the author gained at least one thing, — an uncommon conception of the immense scope of the executive power. His chapter on the transformation of that power during the administration of Lincoln is, to the ordinary American, most interesting. And the last chapter, where he predicts that in case the United States acquire new territory inhabited by races different from her own, the power of the executive will be wonderfully augmented, has been proven by recent events.

J. P. C. JR.

BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES AND CHEQUES.

By Sir John Barnard Byles. Sixteenth Edition. By Maurice Barnard Byles and Walter John Barnard Byles. London: Sweet & Maxwell, Lim. 1899. pp. lxx, 582.

The leading, though not the earliest, English text book on the law of Bills and Notes has passed into its sixteenth edition. It is difficult to recognize full grown in the present stout volume the modest little original published in 1829. That first edition did not aim to compete with the earlier works of Bayley and of Chitty, first published in 1789 and 1799 respectively, but supplied the long-felt want of a brief summary of the

law supported by the leading authorities. The Bills and Notes Act of 1882 marked an era in the English mercantile law. Essentially a codification, it introduced a uniform law for the United Kingdom. The fourteenth edition of the present work in 1885 showed, therefore, a radical change in the phrasing of the text; the definitions were then cast in the language of the statute. The order and arrangement, however, remained much as they were before the act, although thirteen editions had substantially changed those of the author in 1829. The code was remarkably successful in diminishing litigation, and there are, therefore, but few changes to be found in the present volume. The editors, however, are now able to incorporate in its proper place the important case of *Vagliano v. Bank of England*, 1891 [1891] App. Cas. 107, — that a payee may well be "fictitious" within the meaning of the code, although the person sought to be charged did not know that he was such. In the fifteenth edition this case had to be inserted in the preface. The general scheme of the book remains the same as in that edition. The first ten chapters describe the instrument, the next two are devoted to the title of the holder, then come six chapters on his duties, and lastly a description of his rights. The code itself is not only given *in toto* in the appendix, but each section appears appropriately in the text. The body of the work consists of statements of the law, accurate and clear; and each principle is supported by a note containing not only all the authorities but a brief explanation of them. A better work could scarcely have been prepared for the English mercantile lawyer.

J. W.

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A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES. By Jairus Ware Perry. Fifth Edition, by John M. Gould. In two volumes. Boston: Little, Brown & Co. 1899. pp. cxlix, 766.

The wide recognition which Perry on Trusts has received in American courts as well as the real merit of the work justify a new edition of it after an interval of ten years. The present edition makes no change in the text of the book, the additions consist entirely of brief foot-notes and citations of recent authorities — both rather less in quantity than one would expect. The editor points out the changes and ramifications of the law since the last edition without attempting to explain them or to correct the errors of the text — though he often indicates authorities where discussion of the various subjects may be found. The notes are slight but clear and accurate. They seem most important in the chapters, "Rights of *Cestuis que Trust*," "Constructive Trusts," and "Statutes of Limitations."

Whatever is added in this new edition then seems, in general, good — the objections to it lie rather in what has been left out. The exposition of the principles of the law in the original editions was often scanty and historically weak, for example, the general treatment of the doctrine of declarations of trust. The new editor does not try to fill those gaps, he has made a fuller book, and has increased its value, he has not materially changed it. These difficulties are to a certain extent counteracted by many references to other books, — notably to Ames' Cases on Trusts, — but on the whole it is fair to say that the editing has been carried on on a smaller scale than the value of the book warranted. Some minor defects may be noted; the editor is silent concerning the doctrine of *Wetmore v. Porter*, that a fraudulent trustee who has disposed



of the trust *res* may retake from an equally fraudulent holder of the *res*; again, the notes fail to consider the nature of the responsibility of factors and like agents for funds in their hands; and conflicts of authority are given slight attention.

J. P. C. JR.

We have also received:—

**TAXATION, LOCAL AND IMPERIAL AND LOCAL GOVERNMENT.** By J. C. Graham. Third Edition, revised and enlarged by M. D. Warmington. London: P. S. King & Son. 1899. pp. 122. The book, as its title implies, is divided into two parts. The first deals with the subject of taxation. It begins with the assumption that, theoretically, personalty should be taxed at the same rate as realty. The author then goes on to show that the taxes levied as so called local "rates" fall entirely on real property. This, he argues, is a fallacy due to misconstruction of the early statutes and to the great practical difficulty experienced in taxing personal property, because its location was so liable to change. The latter obstacle has now been surmounted; taxes on personalty are to-day successfully collected by the Imperial Government. These Imperial taxes have not, however, remedied the defects in the incidence of local taxes, and it is shown that, notwithstanding them, realty is still taxed at three times the rate of personalty. The conclusions seem correct and convincing. The only fault that might be found is that all the data are fifteen years old,—they are taken from two special parliamentary reports of 1884 and 1885. The remainder of the first part of the book consists in a catalogue of the Imperial taxes, their history and effect. The second part contains short sketches of the origin and growth of the various local authorities, borough councils, school boards, etc., too technical for the general reader and not sufficiently exhaustive to help the special student. The chapter amounts to scarcely more than a digest of the statutes which create the local authorities discussed.

**THE JOURNAL OF THE FEDERAL CONVENTION OF 1787 ANALYZED, ETC.** By Hamilton P. Richardson. San Francisco: The Murdock Press. 1899. pp. 224. The thesis of the author is that the United States government is a national government as distinguished from the federal government. One schooled in the traditions of constitutional discussion must take issue with the method of proof and with the conclusions reached. In tracing the evolution of the Constitution in the Convention, the author rigidly adheres to the Journal of the Convention; he ignores the Martin Letter, the Yates Minutes, and the Madison papers,—because he tells us they were written by enemies of the national plan. But the Constitution may not to-day be taken up *de novo*. That Congress has power to provide for the general welfare is not to be proved, as the author proves it, by arguments as to capitalization and punctuation. The question is all important, but as a matter of constitutional construction it is no longer an open one. A power to legislate for the general welfare is a power to legislate upon all subject-matter, whereas nothing is more fundamental in our constitutional law than that the powers of Congress are limited and enumerated.

**SELECT CHARTERS ILLUSTRATIVE OF AMERICAN HISTORY.**—1606-1775. By William Macdonald. New York: The Macmillan Company. 1899. pp. ix, 401. The "Select Documents Illustrative of the History of the

United States, 1776-1861," by the same editor, has proved a book of exceptional value to students of American history and institutions. The present work appears to be a worthy companion volume. The aim has been to bring together the chief constitutional and legal documents of the American colonial period. The last contains the most important colonial charters, grants, and frames of government, the acts of Parliament most directly affecting the American colonies, and the statutes and state papers of the period immediately preceding the Revolution. Where there has been abridgment it has been done with much judgment; and, so far as appears, the text of the various documents has been reproduced with great care. Though the selection is the best yet published, the editor owes much to his predecessors, especially to Channing and Hart's *American History Leaflets* which he does not acknowledge. For example, he doubtless owes to them the Royal proclamation concerning America, 1763, one of the most important of colonial state papers.

THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE. By Edwin E. Bryant. Second Edition. Boston: Little, Brown & Co. 1899. pp. xxv, 400. This volume is much the same as the first edition published in 1894. Practically the only change is in the citation of a few later authorities and the addition of a summary of the different statutes in the various States relating to the survivability of actions. It is a convenient condensation of the principles of code pleading, with a useful analytical index of the code sections of the twenty-seven States and Territories which have adopted the Reformed Procedure. Although several difficult subjects, such as the System of Pleading in the Courts of Equity and the Civil Law System of Pleading, have been treated perhaps too briefly, the book, on the whole, is a useful introduction to the subject, and points out clearly the changes the Codes have made in the common law system of pleading.

THE LAW RELATING TO THE CUSTODY OF INFANTS. By Lewis Hochheimer. Third Edition. Baltimore: Harold B. Scrimger. 1899. pp. viii, 148. This book is a careful exposition of a small but important topic of the law. The fundamental doctrine of the subject is brought out strongly; that in determining questions of guardianship not the "right" of the parent nor of any other is to be considered, — formerly the rule in England, — but the best interests of the child. The treatment of each minor topic is complete in itself, which, although occasioning some repetition, adds to its availability as a book of ready reference. The more complex questions are fully explained by means of illustrations from decided cases. A discussion of rights and procedure upon *habeas corpus*, copious citations, and an appended collection of forms add to the completeness of the work.

JOHN SELDEN AND HIS TABLE-TALK. By Robert Waters. New York: Eaton & Mains; Cincinnati: Curtis & Jennings. 1899. pp. 251. This little book is a republication of the greater part of Selden's Table-Talk as given by Milward — and the selection includes all the passages which are likely to be of interest at the present day. The book is in handy form and neatly gotten up. The historical introduction gives an interesting account of Selden, but is so rambling and superficial that it is of little value. The footnotes are open to the same objection.



AMERICAN PRACTICE REPORTS. Official Leading Cases in all State and Federal Courts, annotated and systematically arranged so as to include in the Table of Cases of each State its Reported, Cited, and Digested Practice Cases. Editor-in-chief, Charles A. Ray. Vol. II. Washington: Washington Law Book Co. 1899. pp. viii, 802.

CURIOSITIES OF LAW AND LAWYERS. By Croake James. New York: Funk & Wagnalls Co. 1899. pp. viii, 790. This book is a large collection of jests and stories of the legal profession—often amusing, occasionally a bit time-worn. It is singularly free from bad taste, well-indexed, as admirable as a book of its sort may be.

THE QUEBEC LAW INDEX, embracing all the legislation of the Province of Quebec from 1807 down to and including the year 1898. By Harry H. Blight. Montreal, Canada: Theoret, 11 and 13 St. James Street. 1898. pp. 283.

THE DREYFUS STORY. Third Edition. By Richard W. Hale. Boston: Small, Maynard & Co. 1899. pp. 78. This book was reviewed in 13 HARVARD LAW REVIEW, 231. This edition adds a chapter on the Rennes court-martial.

FORMS OF PLEADING. Vol. II. By Austin Abbott. Completed for publication after his decease by Carlos C. Alden. New York: Baker, Voorhis & Co. 1899. pp. xxxix, 805-1858. *Review will follow.*

CASES AND STATUTES ON THE PRINCIPLES OF CODE PLEADING, with notes. By Charles M. Hepburn. Cincinnati: W. H. Anderson & Co. 1899. First instalment. pp. 160. *Review will follow.*

HANDBOOK OF THE LAW OF NEGLIGENCE. By Morton Barrows. St. Paul, Minn.: West Publishing Co. 1900. pp. xii, 634. *Review will follow.*

CIVIL PROCEDURE AT COMMON LAW. By Alexander Martin. Boston: The Boston Book Company. 1899. pp. xxxii, 416. *Review will follow.*

SOME RECENT CRITICISM OF GELPCKE *versus* DUBUQUE. By Thomas Raeburn White. Philadelphia. 1899. pp. viii, 96. *Review will follow.*

WIT AND HUMOR. By Marshall Brown. Chicago: T. H. Flood & Co. 1899. *Review will follow.*

## THE TEACHING OF ENGLISH LAW AT HARVARD.<sup>1</sup>

CAN English law be taught at the Universities?

This question was, some sixteen years ago, raised in my inaugural lecture at Oxford. The answer then given, on theoretical grounds, was that English law could be effectively taught at the Universities by duly qualified teachers to duly intelligent students. It is now in my power to assert with confidence that my speculative conclusion is proved to be correct by the irrefutable results of American experience. Wherever the law of England prevails throughout the American continent the best instructed and the ablest lawyers have been grounded in its principles by professors. The schools of New York, of Chicago, of Ontario, of Nova Scotia, of Boston, and, above all, of Harvard, establish the fact, or (as our lawyers of the older school might put it) give plausibility to the paradox that English law can be taught at Universities, and be taught by University professors. On the other side the Atlantic, indeed, the truth of this conclusion is treated as established past dispute. It will further be admitted by every competent judge that nowhere throughout America is law taught so thoroughly as at the University of Harvard. The Harvard Law School has, compared with other institutions of the United States, an ancient history. It practically owes its existence to the labors of Story, and it is a matter of interest to any member of a college where lectures were delivered by Blackstone to learn that Mr. Viner's noble endowment, in its effect on the study of English law, has surpassed the hopes or the dreams of its founder. It led directly to the production of the famous "Commentaries on the Laws of England;" it led indirectly to the prosperity of the Harvard Law School, for, under the influence, as it may be supposed, of Viner's example, Dane, who

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<sup>1</sup> This article is reprinted from the "Contemporary Review" (November, 1899), and distributed under the auspices of the Harvard Law School Association, by the kind permission of Professor Dicey, and of the publishers of the "Contemporary Review." The delivery of the lectures given by Professor Dicey at Harvard last year was brought about by the Association; and in consequence of the great value of the critical judgments formed by him it has been deemed well worth while to make a permanent record of his views for all students and others interested in the Law School.



curiously enough was, like Viner, the author of an *Abridgment of Law*, founded the chair which was first occupied by Story. But though other eminent men aided and followed Story, the restorer, we may almost say the second founder, of legal education at Harvard is Professor Langdell. His labors have been nobly seconded by colleagues such as Thayer, Gray, Ames, and others, all of whom, by their names and by their writings, are known to every educated English lawyer, and have been crowned with complete success. The prosperity and the greatness of the Law School is almost visible. It has, through the fame which has brought to it lavish donations, acquired large pecuniary resources. The Law School forms a sort of University within the University. Its library constitutes the most perfect collection of the legal records of the English people to be found in any part of the English-speaking world. We possess nothing like it in England. In the library at Harvard you will find the works of every English and American writer on law; there stand not only all the American reports — and these include, as well as the reports of the Federal courts, reports from every one of the forty-five States of the Union — but also complete collections of our English reports, of our English statutes, and of the reports and statutes of England's colonies and possessions. Neither in London nor in Oxford, neither at the Privy Council nor at the Colonial Office, can one find a complete collection either of American or even, astounding as the fact sounds, of our Colonial reports. The library meets the wants (which, by the way, are very different) both of trained lawyers and of students. I have dwelt upon the library because it is an outward and visible sign of the spirit of study and enthusiasm which gives life to the Law School. But it is in its students and its professors, in its crowded lecture-rooms and its admirable teaching, that lies the true glory of Harvard. It is a great thing that teachers whose merit is the thoroughness of their instruction should, within the last fifteen years, have raised the number of the students from 150 to about 550, and should find that the one obstacle to further progress — and it is, under the Harvard system, a very real obstacle — lies in the number of their pupils. The crowd of learners for the moment almost exceeds the physical capacity of the teachers. But the final triumph of the Harvard professoriate is one of which no one but an Englishman well versed in the traditions of English law can appreciate the greatness. The professors of Harvard have, throughout America, finally dispelled the inveterate delusion that law is a handicraft to be practised by

rule of thumb and learned only by apprenticeship in chambers or offices; they have convinced the leaders of the Bar that the Common Law of England is a science, that it rests on valid grounds of reason, which can be so explained by men who have mastered its principles as to be thoroughly understood by students whose aim is success in the practice of the law.

My aim is to expound the conditions and the character of the law teaching at Harvard, and thus explain the causes of its success, and then to consider what are the lessons, if any, which can be learned by our Law School at Oxford from the experience of Harvard.

The Harvard Law School is a professional school for the practical teaching of English law, and is conducted by professors.

This statement embodies a fundamental fact, of which the critic of Harvard should never lose sight; it covers two different points, each of which needs separate attention.

*The Harvard Law School is a professional school.*

Its classes are attended by men who are B.A.s of Harvard or of some other University, where they have already received an adequate general training. They have not necessarily, nor, as I believe, generally, mastered even the elements of law. In this respect they stand in the position of undergraduates beginning to read for our Jurisprudence School at Oxford. But in other respects the student at the Harvard Law School differs from an Oxford undergraduate. He is a man of twenty-two or twenty-three, who, having passed through his University career, wishes to prepare himself for the Bar; he joins the school with the practical object of acquiring knowledge of law. He is to be compared with a student of an Inn of Court who is eating his terms and beginning to read in chambers, or with a young articled clerk who attends classes at the Incorporated Law Society in order to pass his final examination. At the school our student remains for at least three years, and goes through a carefully prepared three-yearly course. In order to obtain the law degree he must have attended at least fifteen sets of lectures. These sets are arranged so as to meet the requirements of men of each year, though in the latter two years a student is allowed free choice of subjects. At the end of each academical year he is examined in the topics of his lectures by the professor whose classes he has attended, and is not allowed to pass on to the studies of the next year unless he has satisfied the examiner. A degree is obtained by success in each of the yearly examinations, and students who pass with special success have their merits recognized in



something like a class list. But, be it noted, the obtaining the degree, and a good degree, is not the student's primary object. What he wants to achieve is to learn English law and to acquire a high reputation for legal knowledge both amongst the professors and amongst his fellow-students.<sup>1</sup>

Any man who has mastered the principles which govern the large departments of law to which the attention of students at Harvard is directed, and many of such students achieve this arduous task, undoubtedly begins his professional life with an amount of knowledge rarely possessed by an able barrister on his call to the Bar, and never, as a rule, acquired by any young Englishman when he begins to read in chambers. Yet, though the advantage of such preliminary knowledge to a person who intends forthwith to begin the practice of the law is obvious, the experience of an English lawyer, imbued with the traditions and habits of the English Bar, inevitably suggests a curious question.

How is it that young Americans, who are keenly enough alive to the importance of actual success in the battle of life, are willing, or even eager, to spend three or four of the best years of their lives, say from twenty-two to twenty-five or twenty-six, in a course of preparatory professional study which no young man aspiring to eminence at the English Bar would dream of pursuing? How is it, to put the same problem in another form, that study at a law

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<sup>1</sup> The studies followed may be best understood by giving a brief synopsis of the curriculum pursued by a very distinguished student : —

*Year I.*

- (1) Contracts.
- (2) Torts.
- (3) Property. (Real and Personal Estates ; Landlord and Tenant, etc.)
- (4) Criminal Law.
- (5) Civil Procedure at Common Law.

*Year II.*

- (1) Evidence.
- (2) Property. (Conveyances, Wills, Exors., etc.)
- (3) Bills and Notes.
- (4) Trusts.
- (5) Jurisdiction and Procedure in Equity. (General principles of unreformed English Chancery Procedure, etc.)

*Year III.*

- (1) Constitutional Law.
- (2) Corporations.
- (3) Partnership.
- (4) Property. (Conditional Limitations, Perpetuities, etc.)
- (5) Equity, Jurisdiction and Procedure. (Specific Performance, etc.)

school is to a young American to a great extent the equivalent of what reading in chambers is to a young Englishman?

It is possible to offer a partial, though not a complete, explanation of what must always to an English critic seem a paradox.

A high law degree, or, indeed, any degree obtained at a University, may be in the United States, as it is in England, of little worth by way of an introduction to business. But a reputation gained at Harvard for extensive and accurate knowledge of law and for dexterity in legal argument may well in America promote a young man's success as a lawyer in a way in which no University reputation whatever can in England foster his success at the Bar. In the United States there exists no distinction between barristers and solicitors, and the combined business of a barrister and of a solicitor is carried on by firms. The number, further, of lawyers is immense: it were hardly an exaggeration to say that every man who is not in business or a minister of religion is a lawyer. Hence, a student who at Harvard has acquired reputation for legal talent finds that in one way or another his fame among his University contemporaries is of actual value to him in his profession.<sup>1</sup> And his name, spread far and wide by his fellow-students, who are many of them practically in the position of what we should call country solicitors, must, I conjecture, when he becomes an actual member of a firm, or, as is often the case, sets up in business for himself, tend to bring work to him. In any case I am convinced that the fusion of the two branches of the legal profession, whatever its other good or bad results, facilitates the acquisition of business by young men of ability and of repute among their contemporaries to an extent which is not easily realized by the practising lawyers of England. If you think the matter out, the truth of this conclusion becomes pretty clear. Clients need in the lawyer whom they consult both experience and ability, and, of the two, experience is the more important. Now, in the system prevailing in England, a barrister beginning his career cannot, even should he possess the legal knowledge of Eldon or the rhetorical genius of Erskine, lay

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<sup>1</sup> A friend, who is thoroughly well-informed upon this matter, writes to me from Harvard as follows: "Our young Honor Graduates are recognized as desirable men because of their ability to deal with legal problems, and, as a rule, secure positions in offices where they receive a small salary from the first. I receive letters every year from lawyers in Boston, New York, Chicago, and other cities asking me for the names of some men about to graduate *cum laude* whom I can recommend for a position in their offices. The *cum laude* men form from one-eighth to one-fifth of the class."



claim to experience. But if the same young barrister could be taken into a firm of repute, the firm would supply experience in the persons of the elder and leading partners, whilst the young man of special talent would import his new or peculiar genius into the firm. This is in reality the state of things in the United States. The client who comes to a firm cannot be expected to entrust his business to young Mr. Jones, though he may know Mr. Jones to be one of the cleverest fellows of his year at Harvard; but he may well trust Mr. Jones when Jones's inexperience is corrected by the mature prudence of the senior partners, Brown and Robinson. To this it must be added that a firm has, from the nature of things, an interest in attaching to themselves a young man of ability, whether as a clerk or a partner. This rule works, though in a way which does not arouse attention, among English lawyers. A distinguished firm of solicitors will assuredly at times take as a partner a man recommended only by his talent and character, and the habit which, only within a very recent period, has become recognized among barristers of employing "devils," apparently marks the growth of a system of legal partnership. However this may be, it is certain that a University reputation tells professionally far more in America than in England. Those who have read the charming biography of Lord Bowen may have noted that his success at the Bar was for some years doubtful, and it seemed at one moment to be on the cards that he might be drawn away from ill-remunerative labors as a counsel by the brilliancy of an assured success in literature. If a man gifted with such genius as Bowen were to appear in the Law School at Harvard, he would not, I am convinced, after a call to the Bar, be compelled to wait for some years before his legal talents became known and were acknowledged in the practical form of business. The value, then, of reputation gained in the Law School is one reason why young men are willing to devote to its courses three of the best years of their early manhood. A second reason, however, is that the teaching they receive exactly meets their intellectual needs.

*The Harvard Law School is a professorial school.*

This statement means much more than the enunciation of the truism that the teaching of Harvard is carried on by professors: it means that the aim of this teaching is to exhibit English law to students as a science, and to impress upon them the knowledge of its fundamental principles.

Professor Langdell has, in a well-known address, admirably de-

fined the lines on which the Harvard system has, under his guidance, been built up:—

"I have tried to do my part towards making the teaching and the study of law [at Harvard] worthy of a University; towards making the venerable institution of which we are celebrating the two hundred and fiftieth anniversary a true University, and the Law School not the least creditable of its departments; in short, towards placing the Law School, so far as differences of circumstances would permit, in the position occupied by the Law Faculties in the Universities of continental Europe. . . .

"To accomplish these objects, . . . it was indispensable to establish at least two things: first, that law is a science; secondly, that all the available materials of that science are contained in printed books. If law be not a science, a University will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it. Again, law can only be learned and taught in a University by means of printed books. If, therefore there are other and better means of teaching and learning law than printed books, or if printed books can only be used to the best advantage in connection with other means—for instance the work of a lawyer's office or attendance upon the proceedings of courts of justice—it must be confessed that such means cannot be provided by a University. But if printed books are the ultimate sources of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him—then a University, and a University alone, can furnish every possible facility for teaching and learning law. I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often travelled it before. What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate or of the Roman prætor, still less of the Roman procurator, but the experience of the Roman jurisconsult.

"My associates and myself, therefore, have constantly acted upon the view that law is a science, and that it must be learned from books."<sup>1</sup>

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<sup>1</sup> "Harvard College: a Record of the Commemoration, November 5th to 8th, 1886, on the hundred and fiftieth Anniversary of the Founding."—Professor Langdell's Address, pp. 84-86.



The essential doctrine, therefore, of the school may be summed up in two statements — first, that English law is no mere handicraft or art, but a science to be deduced from a limited number of principles; and secondly, that the nature and the application of these principles are to be learned from books, or in effect, as this maxim is interpreted at Harvard, from law reports.

By the strictest adherence to this doctrine, Professor Langdell and his eminent colleagues have given to their teaching a character which is at once scientific (*i. e.* logical) and practical.

Their teaching is scientific because their whole aim is to elucidate the principles of English law.

They rate law — a lawyer brought up under our English system is inclined to say too low — the advantage to be gained from reading in chambers.<sup>1</sup> They appear slightly inclined to forget that law must always be partially a handicraft, and that even a scientific knowledge thereof is increased by the intimate acquaintance with the actual working of law which is gained from apprenticeship; if practice needs theory in order that it may be intelligent, scientific theory stands in need of practice in order that it may escape unreality. Still, in substance the masters of the Law School are right. The merely empirical acquisition of legal maxims and the practice of law by rule of thumb have been so much overrated that teachers do well to thrust into prominence the logical aspect of a great legal system.

The teaching, moreover, of the Harvard professoriate, though scientific, is as far removed as possible from being abstract, and is, in the best sense of the word, practical.

The teachers at Harvard are saved from the unreality and vagueness which are apt to infect speculative jurists, not only by their knowledge that they are educating their students for a definite professional purpose — namely, success as lawyers — but also by their intense enthusiasm for the Common Law of England, or rather of the English people. They are apostles of English law. They possess, indeed, far too much liberality of spirit to underrate the instruction to be gained from the comparison of different legal systems. But topics such as Jurisprudence or Roman Law play after all a subordinate part in the Harvard curriculum. It is to-

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<sup>1</sup> The conjecture may be hazarded that reading in a lawyer's office, which resembles the office of a solicitor, is not the intellectual equivalent to reading in the chambers of a leading barrister or (what is now to the great loss of students impossible) to reading in the chambers of a Special Pleader.

wards the elucidation of the principles of the law of England that the attention of the teachers of Harvard is directed; their constant effort is to impress upon the minds of their pupils the history and the full meaning of these principles, as developed in the United States. And this insistence upon the fundamental conceptions of English law has given a peculiar turn to the very mode of thought prevalent in the Law School. Holmes's "Common Law," Langdell's "Summary of the Law of Contracts," Gray's "Rule against Perpetuities," Thayer's "Preliminary *Traité* on Evidence in the Common Law," Professor Ames's most interesting essays on various legal topics, as, for example, on "Consideration," prove (if proof were needed) that their authors are thinkers of no common power. But these works also prove that the theoretical speculations of the writers have grown out of their profound study of the law of England. In truth, the thinking no less than the teaching of the Law School has received an unmistakable impress from the genius of Professor Langdell. Turn to his book on the "Law of Contract." It is full of acute logical thought, which is often expressed in the clearest language, although sometimes with a terseness and concision which perplex trained lawyers who are less skilled than the professor in legal reasoning, and cannot pretend to his minute and unrivalled acquaintance with the history of English case law. It is emphatically the work of a thinker, but every line of the book shows that the study of the law of England has both stimulated and trained Professor Langdell's own immense analytical power, and that upon the study of the law of England by his pupils he relies, and not in vain, as the means for teaching them the most important of all lessons — to think for themselves.

Consider again carefully the latest and most perfect product of legal speculation sent us from Harvard by Professor Thayer. His "Preliminary *Treatise* on Evidence" is almost oppressive in the weight of its legal erudition, and a captious or indolent critic may regret that a writer who, on the topic he has made his own, can speak with decisive authority, should trouble himself with the explanation or reconciliation of dicta delivered by judges or text writers, many of whom possess not half Professor Thayer's intellectual power, and none of whom have explored the foundations of the law of evidence with half his thoroughness. His elaborate account of the development of the rules of evidence in connection with trial by jury shows his mastery of legal history; his logical exhibition of the principles of evidence exhibits a capacity for



subtle analysis which is likely to be underrated because of the very clearness with which its results are expressed; but the point upon which for my present purpose it is most necessary to dwell is that Thayer, like Langdell, is immersed in the Common Law; they are both of them such thorough lawyers that they have been compelled to work out for themselves a system of legal philosophy. Thus, while jurists — much, for example, as Sir Henry Maine — have been impelled by their interest in legal theory or the problems of history to study the principles of English law, the body of American teachers and thinkers, of whom Langdell and Thayer are typical examples have been impelled by their passion for the law of England to become masters of the philosophy and history of law.

It is worth while insisting upon this special attachment exhibited by the leaders of the Harvard Law School to the concrete law of the English people, because it specially qualifies them to maintain that peculiar form of teaching which is at once scientific and professional. They train a student in the study of elementary principles and in the rigid application of logic to the solution of legal problems. But they keep him close to legal facts. They never forget, or suffer him to forget, the Reports; they have always before their minds the necessity for explaining and harmonizing the recorded judgments of American tribunals. Hence their pupils are taught not only to think, but to think, if the expression may be used, legally; and gain an invaluable knowledge, not only of cases, but of the proper use of cases as the basis of argument.

Here we touch upon the most salient and original feature in the Harvard method of instruction. This characteristic or peculiarity is that tuition is in the Law School grounded upon the study of cases, and is in its form catechetical. The way in which this system works is curious. Suppose a student utterly unacquainted with law, as are most young men when they enter the Harvard Law School, to be an attendant, as the present writer had the happiness to be, at Professor Ames's lectures on the Law of Contract. From the first moment he joins the class he has placed in his hands the huge collection of contract cases edited by Langdell. The cases are placed under different heads, as, for example, under "Offer and Acceptance," and under each head are arranged in historical order. Our student is neither assisted nor confused by printed comments. He is left without the aid even of head-notes; he knows that he must prepare for the lecture, or, as it is sometimes aptly called, "exercise," say the first nine or ten cases in the book. He must,

if he can, see their point. He reads, I presume, in some book on the Law of Contract the chapters bearing on the topic in hand. He then comes with from 100 to 200 companions to the lecture. Professor Ames has the names of the students before him. He calls now upon one, now upon another, to state the result of a definite case. He asks questions about it; he raises every point that the case contains; he suggests, in the way of question, variations on the case; he states, in the form of observation, its real gist. This plan of plunging a pupil at once into a mass of cases seems, when one first hears of it, a hopeless one. As a matter of fact its success in the hands of a master such as Professor Ames is patent. It is the Socratic method applied to law and is infinitely stimulating. The whole class are kept alive. Foolish answers or impertinent answers — and of the latter I heard none whatever — are checked by the capacity of the teacher and the opinion of the class. No man willingly plays the fool before his class-mates. What to me was more surprising was the way in which skilful catechetics not only exhausted every case, but brought out the general principle which the cases, or set of cases, illustrate. If there be a case which every teacher of the Law of Contract thinks he knows thoroughly, it is *Williams v. Carwardine*, and over *Williams v. Carwardine* Professor Ames and his students were lingering lovingly when I first joined the class. The discussion is unforgettable. It was perfectly orderly; it was filled with animation. The principle involved was impressed upon me as it never had been before, and, well worn as is *Williams v. Carwardine*, it was shown to hold more of law than I had hitherto suspected that it contained.

Some branches of the law, such, for example, as the Law of Contract or the Law of Torts, lend themselves with special facility to the catechetical method, whilst others, such as the Law of Real Property, are less suited for it. The proportion, therefore, in which current dissertation ought to be mingled with questions must be regulated by the nature of the topic to be taught and in accordance with the judgment of the teacher. Still, though the degree to which the system of question and answer is relied upon varies considerably in different courses of lectures, the catechetical method based on the study of cases is applied at Harvard more or less to all branches of English law, and this system, as conducted by lawyers of eminence, has two special merits.

In the first place, it forces young men to rely on their own efforts to learn rather than let themselves be taught, and must be



a great preservative against cramming. It gives the students at Harvard much the same kind of stimulus which is felt by a young man when he begins to read for the Bar, and, having entered chambers, is called upon for the first time to draft a claim or to write an opinion. The claim is drawn wrong and the opinion is worthless, but the student's effort to obtain knowledge by applying his mind to the solution of a given case is worth more than scores of lectures.

The Harvard system, in the next place, calls into play the disputatious instincts of the whole class. Great, indeed, is the value of the art of contradiction. Young men learn more from wrangling than from reading. The problems of the lecture-room turn into the disputes of the boarding-house, and points of law are discussed with the eagerness and with the ignorance with which in Oxford, some forty years or more ago, young men used to discuss, as I trust they still do discuss, problems raised by the *Ethics* or the *Politics* of Aristotle. Even from an educational point of view the Harvard B. A. may gain as much from wrangling as does the Oxford undergraduate. It is intellectually as stimulating to determine whether an agreement falls within the fourth section of the Statute of Frauds, or whether the true basis of contractual obligation be actual agreement of minds or merely the expression thereof, as to decide whether the benefactor loves the object of his benevolence more than he is loved in return, or whether the good citizen must of necessity be the good man. From the professional point of view the B. A. of Harvard has certainly the best of it. The Aristotelian questions which vague memory still recalls to me have their interest, but the answers thereto have no importance in the conduct of life. To the practising lawyer the interpretation of the Statute of Frauds or thorough mastery of the essentials of a contract may turn out of great utility.

It is what a student thinks and talks about outside the classroom far more than what he hears in lecture which gives him his true education; and for the success of the Harvard method it is essential that students should be perpetually engaged in the examination and discussion of cases.

This end is achieved by the encouragement of two institutions, both characteristic of Harvard.

*First — The Law Clubs and the Moot Courts.*

Take as the type of a Law Club the Pow Wow, which did me the honor to invite me to one of its sittings. It is a club formed

and conducted by students, and is much such a body as might meet of an evening at Oxford to read essays on religion, morals, politics, or art. But it is a club which means business, and does it; it exists for the sake of holding legal arguments, carried on, as far as may be, subject to the formalities and to the conditions under which they would be carried on in real court. It is, in fact, the elaborate imitation of a court, or rather of a body of courts. The intricate constitution of the Pow Wow is difficult to master, and its details if accurately given, might not interest readers. Two or three facts are worth mentioning, as giving some idea of the nature of the society. The club elects three courts: eight members from the men of the first year form the superior court, eight from the men of the second year the supreme court, and eight from the men of the third year the court of appeals. Every arrangement about these courts is carried out with the utmost seriousness, and the object aimed at and attained is that argument should be carried on by members of the club before a court which from the standing of the judges, should have greater knowledge than, and therefore carry authority with, the men arguing before it. Everything is done to give solidity and seriousness to the argument. First, a case is made up with great care, which may take the form either of an agreed statement of facts or of a special verdict, or of a demurrer. It is "settled" by the person who is to preside over the court during the argument, and who in general would be a member of the tribunal immediately above the court in which the case is heard. Two members of the club are assigned to argue the case (which always raises some difficult point) as counsel. A week before the argument the counsel hand in to the court a list of all the authorities they are going to cite. Hence, before the court meets the whole bearing of the case is known to the presiding judge and his colleagues, and he is able to guide the argument with intelligence.<sup>1</sup> Before the day for argument the case is well known to most of the club. The members attend in a thoroughly critical spirit. The case is most carefully argued before the court; when it ends each judge delivers a judgment or, as Americans

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<sup>1</sup> *Example of Club Court Case.*—*Story v. Townsend.* Story was possessed of a piece of land, and Townsend, being desirous that his friend Eaton should get title to said land, agreed to pay Story \$1000 on Story's making a conveyance to Eaton of the land. Both parties to the contract promised to perform. After a reasonable time had elapsed, Story offered to execute and deliver a conveyance of the land, when Townsend discharged him from making any conveyance. Townsend refuses to pay the \$1000, and Story brings this action for damages from non-performance of the contract.



would say, an opinion, and the chief is expected in the course of a week or so to hand in to the club a written judgment. All this may sound like child's play. It is nothing of the sort. American students, whether at Harvard or Princeton, take themselves very seriously. The counsel and the audience are all in earnest. The counsel wish to gain a reputation for legal knowledge and skill in argument; the hearers come to sharpen their power of legal criticism and discernment. The result is pre-eminently satisfactory. At the hearing at which it was my good fortune to be present everything went on with the utmost order. A stranger might have fancied he was listening to the proceedings of a court. Nothing, indeed, was said of any marked brilliancy, but the audience showed unmistakable interest, and the reasoning was sound and business-like. The arguments, indeed, were just of the kind to which an English judge would have given attention if presented by a youthful barrister. The full merit of the proceedings was appreciated by a critic only when he learned that the youths who argued were young men of the first year. It was astonishing to see how soon, under good training, young men could acquire the legal habit of mind.

Law Clubs are the creation of students though they are favored by professors. The Moot Court is a University institution. It is a meeting at which the whole Law School is assembled, and whilst a Law Professor sits as judge, young men, generally in their third year, argue some difficult point of law in the manner which would be required of a barrister when appearing, for instance, before the Supreme Court of the United States. In the Law Schools throughout the Union these Moot Courts exist, and care is taken to train young men in every kind of argument in which, when they begin to practise, they may be called upon to take part. At the Boston Law School, for example—which, though its objects are more immediately practical than those aimed at by the School at Harvard, is an excellent institution—I heard two young gentlemen make an application for an amendment of pleadings. Nothing in its way could be better. The truth is that whether in the clubs or in the Moot Courts young men gain an amount of practical training which must be invaluable, and the want whereof hampers every English barrister, however able or learned, when, for the first time, he has to address a real jury or argue before a real judge. But the practical advantages obtained from the Law Clubs and Moot Courts sink into nothing compared with the benefit

which these institutions confer upon students by kindling ardent interest in legal problems.

*Secondly—The Harvard Law Review.*

If the Law Clubs stimulate debate, the REVIEW encourages learning. Its pages contain admirable work by the ornaments of the American Bar and the American Professoriate. But while the REVIEW is known to all Englishmen interested in legal speculation, few of us are aware that this important periodical is managed by the students of the Law School. Admission to the editorial body, consisting of some sixteen or seventeen persons, is an object of natural ambition to the elder students. To take part in the work of editing is one of the best occupations of men in their third year who, having reached the age of about twenty-four or twenty-five, have advanced far on the road towards the acquisition of sound legal knowledge.

The constant and scientific study of cases under the guidance of eminent lawyers, practice in the Law Clubs or Moot Courts, assiduous labor in the editing of the LAW REVIEW—these are the means by which the teachers of Harvard keep alive the vivid interest of students in the problems presented by the living law of England and of America. Hence their splendid and undoubted success.

“Mr. Brandeis describes ‘the ardor of the students.’ Professor Ames, writing of the School ten years ago, said: ‘Indeed, one speaks far within bounds in saying that the spirit of work and enthusiasm which now prevails is without parallel in the history of any department of the University.’ What was true then is at least equally true now. The students live in an atmosphere of legal thought. Their interest is at fever heat. One of the professors informed me that nine out of ten of his pupils study hard. If they had had a period of idleness at the University it was in their Arts course. The entrance into the Law School they looked upon as the entrance into the real work of life.”<sup>1</sup>

What, then, are the lessons to be learned by Oxford from the example of Harvard?

To some observers, and notably to my friend Dr. Birkbeck Hill, who, in his “Harvard College by an Oxonian,” has given the description with which I am acquainted of an American University, and who, like myself, has been captivated by the charm and the life of the Law School, the one conclusion which appears to suggest itself is this: that the teachers of law at Oxford should note what

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<sup>1</sup> Birkbeck Hill, *Harvard College by an Oxonian* (1894), p. 261.



has been achieved in the United States and go and do likewise, and, by changes which appear to him comparatively slight, raise up an institution which may rival the fame and share the prosperity of the Harvard Law School.<sup>1</sup> This view is one naturally taken by an outsider, and it is one, I may add, which the teachers at Oxford, who, whether they be termed professors, tutors, readers, or lecturers, are, I may venture to assure our critic, zealously devoted to their work, would be glad, were it possible, to accept. But Dr. Hill's doctrine, though natural, could not be accepted by any lawyer, either from the United States or from England, who had examined from the inside the working of the American and the English law schools. There exists, as has been pointed out in these pages, an essential difference in their position. The aim, indeed, of the Law School at Harvard is the promotion of scientific legal education, and such is also the aim of the Law School at Oxford. But the aim of the Law School at Harvard is professional; its pupils are men reading for the Bar. The aim of the Law School at Oxford is, and ought to be, to a great extent, educational; most of the men who attend it are youths going through a course of University training. Hence the stimulus to work in the one case is, in the main, the desire to master the principles of law with a view to professional success; the stimulus to work in the other case is the desire, and the perfectly legitimate desire, to obtain a good place in the class list; and, let it be added, the desire to gain real knowledge with a view to professional eminence is, on the whole, a much stronger, as also a much wholesomer, kind of stimulus than an ardent wish for a First Class. These differences are essential; they cannot, whatever our wishes, be overlooked. They determine, to a great extent, the course of instruction; they explain, for instance, the far greater prominence given at Oxford than at Harvard to speculative subjects, such as Roman Law, Jurisprudence, International Law, which have a high educational value, but will in general not greatly aid a barrister in the discharge of his professional duties; he may assuredly be fortunate enough to acquire a large practice, and yet not once in the course of ten years come across a case requiring for its solution a knowledge either of Roman or of International Law. The differences pointed out further explain and amply justify the great stress laid at Oxford upon examinations and class lists, and the comparatively slight stress laid

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<sup>1</sup> *Harvard College by an Oxonian*, pp. 264, 265.

upon them in the United States. There is no need to compel or induce a youth to work by the hope of a First Class, or the fear of being plucked when he is urged to labor by incipient and ardent professional ambition. Every teacher who keeps his eyes open must have been struck by the way in which not only the industry but the intellectual energy of many a young man is increased when he passes from the University to a barrister's chambers or a solicitor's office.

To say that an English University cannot, as regards the teaching of the law, copy Harvard is a very different thing from saying that the experience of the great American Law School does not contain valuable lessons for us at Oxford.

The experiment set on foot by Professor Langdell and carried out by himself and his colleagues, establishes the pre-eminent value of the catechetical system as applied to the study of cases. The most that can be said against the scheme of instruction pursued at Harvard is that its merits would be increased if it were supplemented to a greater extent than it is by the kind of lectures which are to be heard at English and at Continental Universities. The teachers of Harvard are admirable expositors of legal theories: there is no reason why they should confine themselves to the practice of catechetics; a friend may also be allowed to add that the teaching of law, as probably of other subjects, at Harvard might gain a good deal as an instrument of education if it were possible to introduce more than appears to exist of the personal relation between teacher and pupil; this intimate personal relation is the great merit of the tutorial system which itself may be looked upon as the fruit of life in college. Still, subject to these reservations, the Harvard method, where it can be applied, is in itself simply admirable. Where the pupils can be induced to perform their part by giving oral answers to questions asked in class, and by carefully getting up cases before attendance at lecture, no plan of legal teaching is so stimulating or so full of instruction. Nor ought it to be impossible, though the difficulties of achieving the end desired are considerable, for Oxford undergraduates to create for themselves societies for the formal conduct of legal argument. To extend the use of catechetics and to encourage the formation of law clubs are objects of which the zealous body of law-teachers existing at both our Universities should never lose sight.

American experience, in the second place, shows the expediency of creating, if possible, a course of post-graduate legal study, in



which the teaching may be at once scientific and professional. The condition of things at Oxford suggests, at any rate, one of the means by which this end may be in part attained. The undergraduates who go into the jurisprudence school are many of them most promising pupils. Still they are undergraduates going through a University curriculum, and not men who, having taken a degree, are about to enter upon the profession of law. The B.A.s who read for the B.C.L. examination are men who have passed through the University course and for the most part, like the students at Harvard, are about to become lawyers. The B.C.L. examination, owing to the labors of my friends Mr. Bryce and Professor Holland, is an admirable one. The men who read for it pursue a course of study as well planned for laying the foundation of sound legal knowledge as can be recommended to a student earnestly bent on mastering the principles of law. The one defect, as far as the University is concerned, of the aspirants for a B.C.L. degree is that from the necessity for reading in chambers they rarely stay in Oxford, and thus do not provide, as they would otherwise do, a class of men to whom could be given serious post-graduate instruction. Every teacher of law at the University should therefore carefully consider how best to induce men reading for the B.C.L. degree to continue their studies, at any rate for a year, at the University. We may, it is to be hoped, at any rate when a legal University is founded in London, make good the claim, to the recognition of which we have already a reasonable and moral right, that the holder of a B.C.L. degree should be exempted from the need of going through any examination as a condition for entering the profession of the law. This result we cannot, however, obtain by our own efforts: the more immediate question for the University is whether persons who have received a liberal education elsewhere, and many of whom would highly value the degree of B.C.L. of Oxford, may not by slight alterations in our arrangements be induced to reside and study at Oxford. This, however, is not the occasion for discussing details. All that can certainly be asserted is that the University and its teachers ought to do everything possible to foster study for the B.C.L. degree, and thus create, if possible, the serious study of law at Oxford by persons who have passed through their University curriculum.

The best result, however, of the experience of Harvard is that to every person engaged in the earnest teaching of the law in England, this experience gives immense encouragement. We learn

from it that, under favorable circumstances, English law can be taught with unlimited success by the professors and teachers of a University. Nor, when the matter is fairly considered, is there any real ground for being disheartened by the fact that the numbers of our law students are fewer and the success of the Law School less than at Harvard. As I have insisted, the conditions under which law is taught in England and in the United States are different; and we are all of us too apt to forget how very recent has been the revival of the active study of law at our English seats of learning. By a curious paradox, it is of older date in the United States than in England. On the other side of the Atlantic the revival dates back at least from the days of Story. The condition of things there is much what it might now have been with us had Blackstone been followed by a line of successors as eminent and as zealous as the Commentator. Even as it is, the change produced within little more than thirty years is great. Within about that period the teaching of law both at Oxford and at Cambridge has become a reality, and is now an important part of University life. The energy of its teachers has been turned, and most wisely turned, towards the improvement of institutional works. The monumental "History of English Law," commenced by Pollock and Maitland; Digby's "History of the Law of Real Property;" Holland's "Jurisprudence;" Moyle's edition of the "Institutes" — books the merit whereof is acknowledged not only in England, but throughout the length and breadth of the United States — are signs of the movement which is making law a part of English literature. This shows the spirit of the time. The annals of Harvard conclusively attest the influence of such a spirit. A Law School in England can never be a copy of a Law School in America; but there is no reason whatever why serious students of law at Oxford should not, like the best students at Harvard, attain what is the true end of legal education, and be taught to "live in an atmosphere of legal thought."

*A. V. Dicey.*



# HARVARD LAW REVIEW.

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VOL. XIII.

FEBRUARY, 1900.

NO. 6

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## THE RIGHT TO LOCAL SELF-GOVERNMENT.

### I.

ACCORDING to a long line of cases, towns and cities in the United States are completely under the control of the legislature, unless otherwise provided in the constitution.<sup>1</sup>

According to another line of cases, towns and cities have certain powers that the legislature cannot interfere with, even though the constitution be silent on the subject.<sup>2</sup>

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<sup>1</sup> *People v. Draper*, 15 N. Y. 532, 1857; *Mayor, &c. v. State, &c.*, 15 Md. 376, 1859; *State v. County Court, &c.*, 34 Mo. 546, 1864; *Booth v. Town of Woodbury*, 32 Conn. 118, 1864; *Webster v. Town of Harwinton*, 32 Conn. 131, 1864; *People v. Mahaney*, 13 Mich. 481, 1865; *People v. Shepard*, 36 N. Y. 285, 1867; *Philadelphia v. Fox*, 64 Penn. St. 169, 1870; *Town of Duanesburgh v. Jenkins*, 57 N. Y. 177, 1874; *Barnes v. District of Columbia*, 91 U. S. 540, 1875; *State v. Covington*, 29 Ohio St. 102, 1876; *Pumphrey v. Mayor, &c.*, 47 Md. 145, 1877; *Burch v. Hardwicke*, 30 Gratt. 24, 1878; *Perkins v. Slack*, 86 Penn. St. 270, 1878; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 1879; *Mereweather v. Garret*, 102 U. S. 472, 1880; *Coyle v. McIntire*, 7 Houston (Del.), 44, 1884; *State v. Smith*, 44 Ohio, 348, 1886; *State v. Hunter*, 38 Kans. 578, 1888; *Met. R. Co. v. District of Columbia*, 132 U. S. 1, 1889; *Commonwealth v. Plaisted*, 148 Mass. 386, 1889; *Grimble v. People*, 19 Col. 187, 1893; *State v. Williams*, 68 Conn. 131, 1896.

<sup>2</sup> *People v. Hurlbut*, 24 Mich. 44, 1871; *People v. Albertson*, 55 N. Y. 50, 1873; *People v. The Common Council of Detroit*, 28 Mich. 228, 1873; *Park Commrs. v. The Mayor, &c.*, 29 Mich. 343, 1874; *People v. Lynch*, 51 Cal. 15, 1875; *Allor v. Wayne*, 43 Mich. 76, 1880; *The People v. Porter*, 90 N. Y. 68, 1882; *Robertson v. Baxter*, 57 Mich. 127, 1885; *Atty.-Gen. v. Detroit*, 58 Mich. 213, 1885; *Wilcox v. Paddock*, 65 Mich. 23, 1887; *State v. Denney*, 118 Ind. 382, 1888; *City of Evansville v. State*, 118

With such eminent authorities diametrically opposed to each other, it is obvious that no solution can be reached except by considering the fundamental principles on both sides. It is only thus that we can find a firm foundation on which we can rest our decision in favor of one or the other of these two conflicting sets of authorities.

Is a constitution a grant of powers to the three departments of government, — the executive, the judicial, and the legislative? If it is, all powers are still in the people that are not expressly granted in the constitution, or impliedly granted as necessary to carry out the expressly granted powers. Or are all powers vested in the three departments of government above named, unless they are expressly reserved in the written constitution?

It is admitted that the people are the source of all legal power and authority in the United States. "Sovereignty is and remains in the people." The sovereign is the person, or body of persons, over whom there is politically no superior.<sup>1</sup> It follows that the people, the sovereign, have parted only with what they have granted — that unless any one particular specified power of government is found to be granted in a constitution (either expressly or impliedly to carry out what is expressly granted), such power is still in the people.

An examination of any American written constitution will show that certain parts may be cited in support of either of the above propositions. It is submitted, however, that the better view is that our form of government is one in which all power is reserved to the people, unless it can be found to be somewhere delegated to some department of government.<sup>2</sup>

"At the adoption of the state constitution all power was vested in the people of the state. The people still retain all power, except such as they expressly delegated to the several departments of the state government by the adoption of the constitution. In the first section and first article of the constitution it is declared that 'all power is inherent in the people.' It is contended by counsel that, as certain rights were granted and certain other rights reserved by the people, therefore all rights were granted, except such as were expressly reserved. The peculiarity of the theory is that while the people, by the constitution, made grants of power to three different departments of government, it is con-

Ind. 426, 1888; *Board of Met. Police v. Board of Auditors*, 68 Mich. 576, 1888; *Rathbone v. Wirth*, 150 N. Y. 459, 1896; *State v. Moores*, 76 N. Rep. 175, 1898.

<sup>1</sup> Jameson, *Const. Convs.* § 18; *Penhallow v. Doane's Administrators*, 3 Dallas, 54.

<sup>2</sup> *State v. Denny*, 118 Ind. 449 (1888), by Olds, J., at p. 457.



tended that all power that was at that time in the grantor, the people, passed to one branch of the government, viz., the political or legislative branch, and that it took all power not mentioned in the instrument, and the executive and judiciary took only such as was expressly granted to them, and the people retained such only as was specifically named and reserved. It is certainly a novel method of construction, and contrary to all the rules for construing contracts, deeds, wills, and other written instruments, and it seems to us that the proposition need but to be stated to prove its fallacy. In construing and giving an interpretation to the constitution, we must take into consideration the situation as it existed at the time of its adoption, the fact expressed in the instrument that all power is inherent in the people, the rights and powers vested in and then exercised by the people, the existence of cities and towns and the right of local self-government exercised by them, and the laws in force and form of government existing at the time of its adoption."

A constitution "grants no right to the people, but is the creature of their power, the instrument of their convenience. . . . A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents."<sup>1</sup>

Let us now inquire about the legislative power, — whether the sovereign people have placed it unreservedly in the hands of the legislature. If they have, if there are no limitations upon the exercise of the legislative power by the legislature, it would amount to a renunciation by the people of their sovereign power, and the substitution of their agent, the legislature, as the supreme master in the state.

"That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."<sup>2</sup>

The view stated by Cooley<sup>3</sup> is that in each state of the Union the power of legislation was originally in its people. They have delegated certain of these powers to Congress. They have delegated certain other of these powers to their own legislatures; "and, granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as, at the same time, they saw fit to impose restrictions. While, therefore, the parliament of Britain possesses completely

<sup>1</sup> Cooley, *Const. Lims.* 5th ed. 47, 6th ed. 49, citing *Hamilton v. St. Louis County Court*, 15 Mo. 13, per Bates, *arguendo*.

<sup>2</sup> By Story, J., in *Wilkinson v. Leland*, 2 Pet. 627, at p. 657.

<sup>3</sup> *Const. Lims.* 6th. ed. 205.

the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power, except, *first* as it may have been limited by the Constitution of the United States; and, *second*, as it may have been limited by the constitution of the state." Or, as stated by Denio, C. J.:—

"The people, in framing the constitution, committed to the legislature the whole law-making power of the state which they did not expressly or impliedly withhold."<sup>1</sup>

Granting this, what *was* the whole law-making power of the state? The inquiry takes us back to a time when there was no written constitution. If, *at that time*, the whole people had assembled to pass laws, what would have been their powers? Such an assembly would not have been a mere mob, a collection of individuals knowing no law, subject to no restraint.

"The constitution was not framed for a people entering into a political society for the first time, but for a community already organized, and furnished with political and legal institutions adapted to all or nearly all the purposes of civil government; and that it was not intended to abolish these institutions, except so far as they were repugnant to the constitution then framed."<sup>2</sup>

"When, therefore, the constitution vests the legislative power in the General Assembly, it must be understood to mean that power as it had been exercised by our forefathers, before and after their migration to this country."<sup>3</sup>

Granting, then, that complete powers to make laws have been granted by the people to the legislature, except as limited by the Constitution of the United States and of each state, the inquiry is pertinent, what is the constitution? Does it consist of the written constitution only? Or is part of every constitution unwritten? And, in an inquiry of this kind, must we take into consideration the unwritten as well as the written constitution? For the whole of any American constitution is not to be found within the limits of the written constitution. What constitution sets forth the power of the judiciary to declare an act of the legislature unconstitutional, because in conflict with the written constitution, when the question arises in an actual adversary case? This power, our most valuable contribution to political government, is however, as much a part of the common law of the land, as a part of the unwritten constitution, as if it were expressly stated in the written constitution.

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<sup>1</sup> *People v. Draper*, 15 N. Y. 532, at p. 543 (1857).

<sup>2</sup> *People v. Draper*, *ut supra*, 537.

<sup>3</sup> *Per Ruffin, J.*, in *Caldwell v. Justices, &c.*, 4 Jones, (N. Car.) Eq. 328 (1858).



Rhode Island contributed largely to this new check upon the power of the legislature by the course taken by its Supreme Court in 1789 in the celebrated case of *Trevett v. Weeden*. "The first reported American case in which a judicial judgment rejected a legislative act as void, because unconstitutional, was *Trevett v. Weeden*, which arose in Rhode Island, where the then constitution was not written."<sup>1</sup>

May 4, 1776, this state passed a declaration of independence of its own, followed two months later by the passage of the great Declaration of Independence. This state continued to govern itself under the forms of the royal charter of 1663 until 1842, although without any formal sanction by the people. From May 4, 1776, to November 5, 1842, a period of sixty-six years and a half, Rhode Island, like England, was under an unwritten constitution. As this has frequently been denied, the following authorities are cited as final upon this subject. In *Wilkinson v. Leland*,<sup>2</sup> Story J., said: "Rhode Island is the only state in the Union which has not a written constitution of government, containing its fundamental laws and institutions." Jameson<sup>3</sup> says: "Connecticut and Rhode Island had unwritten Constitutions at the time of the Revolution, modelled in general after that of England, which continued in force until 1818 and 1842 respectively."

Cox, in his scholarly book on Judicial Power and Unconstitutional Legislation, at p. 177 says: "It must here be recalled by the reader that the constitution of Rhode Island was, in 1786, an *unwritten* constitution, ascertained from history, not from the inspection of a written fundamental law denominated a constitution. Cf. *Luther v. Borden*, 7 How. 35, by Taney, J."

This point, although seemingly of theoretical importance only, is important in its bearings upon the "Dorr War" and its causes, when that incident is studied and its history written by a competent hand. It is also important because one of the peculiar features of this unwritten constitution, continuing the unwritten as well as the written laws and customs that had arisen under the previous two charter governments of this state, is the power of its towns and cities to the control of their own local affairs, to which subject we shall return

But what is the real meaning of a constitution? Is a constitu-

<sup>1</sup> Cox, *Jud. Power and Unconst. Legislation*, 177, 160. See also Cooley, *Const. Lims.* 6th ed. 38 note, and 193 note, and the excellent report of this case in 1 *Thayer Cases in Const. Law*, 73.

<sup>2</sup> Pet. 627, at p. 655 (1829).

<sup>3</sup> *Const. Convs.* 4th ed. 83.

tion only that which is expressly written? or do we mean by "a constitution" that which is unwritten as well as also that which is written? In *People v. Harding*,<sup>1</sup> Cooley, C. J., says:—

"And in seeking for its real meaning we must take into consideration the times and circumstances under which the state constitution was formed,—the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own, which is likely to be more or less peculiar, and, unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. This the court must keep in mind when called upon to interpret it; for their duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express."

And yet no constitution is wholly unwritten. The Bill of Rights, the Acts of Settlement concerning the succession to the throne, the oaths of office taken by the king and the members of parliament, even Magna Charta itself, being in the nature of compacts entered into by different parties, are formal sanctions of so much of the organic or fundamental law of England as parts of a written constitution, and, theoretically at least, they can be abrogated only by consent of both parties thereto. The difficulty is there is no means provided in England whereby a violation thereof can be declared null and void. Should the king violate these parts of a written constitution, he may be impeached. But should parliament violate them, there is no remedy.

In *People v. Hurlbut*,<sup>2</sup> Cooley, J., said:—

"If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood and mutual responsibility in neighborhood interests; the precepts that have come from the revolutions which overturned tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so,—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit,—that which gives it force and attraction, which makes it valuable, and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally

<sup>1</sup> 53 Mich. 481 (1884), at p. 485.

<sup>2</sup> 24 Mich. 44 (1871), p. 107.



fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give, — this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.”

The sixteenth article of Magna Charta provides:—

“Furthermore we will and grant that all other cities and burroughs and towns and ports shall have all their liberties and free customs.”

One of the most cherished of these liberties was the right of local self-government. Can it be contended that this right is lost because it is not expressly reserved in our written constitutions? Is it not a part of the unwritten constitution, one of the common-law rights brought over from England by our ancestors and never surrendered?

While not denying that there may be states in the Union in which, from their peculiar origin and subsequent development, the state may have absolute control over the towns and cities within its borders, this theory is certainly utterly inapplicable in the case of the state of Rhode Island. It is also probably inapplicable in the case of all the other New England states and New York, and possibly it is inapplicable in the case of some other states.

The original towns or, more properly speaking, the original colonies, of Rhode Island, existed before there was any colony or state with well-defined self-instituted powers, legislative, judicial, and executive, that were not surrendered when they agreed to unite. New towns were admitted or created as necessity arose and came into being, with the same powers as those possessed and enjoyed by the original towns or colonies. The system of town government brought to this country from England by our forefathers has nowhere been so faithfully and persistently applied and developed as in Rhode Island. Here it is now to be found in its most perfect form, and working more fully and more successfully than in any other state in the Union.

Among the powers that have always been reserved and exercised by the towns and cities in Rhode Island is the power to manage their own local affairs.<sup>1</sup>

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<sup>1</sup> Newport was temporarily incorporated as a city from June 1, 1784, to March 27, 1787.

Providence was incorporated as a city November 5, 1831, to take effect the first Monday in June, 1832.

Newport was again incorporated as a city May 6, 1853, and the charter was accepted May 20, 1853.

Pawtucket was incorporated as a city March 27, 1885, and the charter was accepted April 1, 1885.

To sustain these propositions, it will be necessary to examine briefly the history of this state, its successive compacts of government, charters, and constitution, and the constitutional development of its government.

In Rhode Island the four original towns were really separate colonies, and they existed before there was any Rhode Island. They made it by their union. They derived no powers from any charter, and no title nor any authority to any land from the crown, except from the Indians, by purchase. Providence was thus settled in 1636; Portsmouth, originally Pocasset, in 1638; Newport, in 1639; and Warwick, in 1642-43. These were the original colonies, or towns, subsequently the united colony, first under the charter of 1643-44, then under the charter of 1663, until the colony declared its independence of England, May 4, 1776, when it became the state of Rhode Island. It was not until 1842 that the present constitution was adopted. But these four original colonies or towns must not be confounded with the present towns of the same names, out of which many of the later towns have been carved, all, however, with the same rights, powers, and duties that the four original towns had. Each one of the first three had its own agreement or agreements of association, voluntarily entered into by its own settlers, without authority or sanction of any kind from crown or parliament, sufficient to enable its own inhabitants to maintain its separate political existence and to carry on its own government, each with its own executive, judiciary, and law-making power. (As to the fourth, Warwick, see below.) Each one bought the title to the lands within its own limits of the Indian occupants, and lived at peace with them. They might have continued indefinitely at peace with them but for the misdeeds of the adjacent settlements in Massachusetts and Connecticut.

The first of these voluntary written compacts of government entered into on Rhode Island soil is that of Providence, signed in 1636 by thirteen of the founders. It is famous for its setting forth, although only negatively and by implication, of Roger Williams's contribution to the science of political government, the doctrine of the utter separation of church and state, that became distinctively

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Woonsocket was incorporated as a city June 3, 1888, and the charter was accepted in November, 1888.

Central Falls was incorporated as a city February 21, 1895, and the city government was organized March 18, 1895.

These are all the cities there are in this state. Each had its form of government changed from that of a town to that of a city at its own initiative, and subject to ratification by its own electors.



Rhode Island doctrine, and thence has spread to every state in the union, and is now spreading to every civilized land. This compact was as follows: —

"We whose names are hereunder, desirous to inhabit in the town of Providence, do promise to subject ourselves in active or passive obedience to all such orders or agreements as shall be made for public good of the body, in an orderly way, by the major assent of the present inhabitants, masters of families, incorporated together into a town fellowship, and others, whom they shall admit unto them, only in civil things."<sup>1</sup>

The original may still be seen in the City Hall, Providence, framed, and hung between two plates of glass; and, from the momentous consequences that have resulted from it, it is certainly one of the most famous compacts of government ever drawn.

In 1637 another and more elaborate form of government was adopted, with provisions for the settlement of disputes between the townsmen by arbitration. It may be found in 1 R. I. Col. Recs. 27.

The first compact of government of Pocasset, or Portsmouth, was as follows: —

"The 7th day of the first month, 1638.

"We whose names are unwritten do here solemnly in the presence of Jehovah incorporate ourselves into a Bodie Politick and as he shall help, will submit our persons, lives and estates unto our Lord Jesus Christ, the King of Kings and Lord of Lords and to all those perfect and most Absolute lawes of his given us in his holy word of truth, to be guided and judged thereby. — Exod. 24. 3, 4; 2 Cron. 11. 3; 2 Kings 11. 17."

Signed by William Coddington (and 18 others).<sup>2</sup>

The second compact of government of Portsmouth was as follows (the words in brackets are worn away): —

"April the 30th 1639

"We, whose names are under [written doe acknowledge] ourselves the legall subjects of [his Majestie] King Charles, and in his name [doe hereby binde] ourzelves into a civill body politicke, unto his lawes according to matters of justice."

(Signed by Will'm Coddington and 28 others.)

"April 30. 1639

"According to the true intent of the [foregoing instrument wee] whose names are above particularly [recorded, do agree] Joyntly or by the major voice to g[overne ourselves by the] ruler or Judge amongst us in all over [transactions] for the space and tearme of one [yeare — he] behaving himself according to the t[enor of the same]."<sup>3</sup> . . .

<sup>1</sup> 1 R. I. Col. Recs. 14.

<sup>2</sup> Ib. 52.

<sup>3</sup> Ib. 70.

The compact of government of Newport, entered into by the Newport settlers before they moved from Pocasset, was as follows: —

“Pocasset, On the 28th of the 2d [month] 1639

“It is agreed by us whose hands are underwritten, to propagate a Plantation in the midst of the Island or elsewhere: And doe engage ourselves to bear equall charges, answerable to our strength and estates in common: and that our determination shall be by major voice of Judge and elders; the Judge to have a double voice.”

Present Wm Coddington, Judge (and eight others).<sup>1</sup>

The settlement at Portsmouth, in 1638, was made at the upper end of the island of Aquidneck; that at Newport, in 1639, at the lower end of the island, by a minority of the principal settlers at Portsmouth. They carried with them the records made to that time, and continued them at Newport.

Warwick was settled in 1642-43. The settlers did not form any corporation or agreement of association of any kind, claiming that as English subjects they had no right to erect a government without authority from the crown or parliament. They continued without any government and officers until the charter of 1643 was accepted, and an organization thereunder perfected in 1647.

We have therefore the separate settlement of Providence, Pocasset or Portsmouth, Newport, and Warwick before any charter whatsoever from England, the purchase of the land from the Indians, and the adoption of separate self-formed compacts of government, with the exercise of the necessary powers of government, in at least three of these colonies, entirely independent of the mother country, or of any authority derived therefrom.

The separate colonies exercised such judicial powers as were necessary for their peace and safety. The first instance we find was in 1637, when Joshua Verin was tried in town-meeting, convicted, and disfranchised, for not allowing his wife to hear Roger Williams preach, as she wanted to. This was done by the major assent of the freemen in open town-meeting.

“It was agreed that Joshua Verin, upon the breach of a covenant for restraining of the libertie of conscience, shall be withheld from the libertie of voting till he shall declare the contrary.”<sup>2</sup>

Foster (Town Government in Rhode Island, 18) says: —

“There are some minor variations between the practice of Providence and that of Portsmouth. For instance, in the former town the adminis-

<sup>1</sup> R. I. Col. Recs. 87.

<sup>2</sup> *Ib.* 16.



tration of justice was committed to the whole body of citizens, with at first absolutely no discrimination. The next step was to select two 'deputies.' In Portsmouth, on the other hand, the citizens began by choosing one of their number 'Judge.'"

"The 7th of the first month, 1638.

"We that are Freemen Incorporate of this Bodie Politick, do Elect and Constitute William Coddington Esquire, a Judge amongst us, and so covenant to yield all due honour unto him according to the lawes of God, and in so far as in us lyes to maintaine the honour and privileges of his place which shall hereafter be ratified according unto God, the Lord helping us so to do.<sup>1</sup>

"WILLIAM ASPINWALL, Sec'y."

Later, in the same year, three "elders were associated with him in the Execution of Justice and Judgment."<sup>2</sup> Yet even they were obliged to make a quarterly account of their rulings to the town-meeting (in early records designated "the Bodey").

In September, 1638, the Portsmouth town-meeting summoned eight inhabitants, whom it tried, convicted, and sentenced, some for drunkenness, some for rioting.<sup>3</sup>

In another instance the Portsmouth town-meeting condemned and divided the property of an absconding debtor (do. 64).

April 30, 1639, after the minority had left, to found Newport, a new organization was perfected and signed by twenty-nine persons.<sup>4</sup> An act was passed the same day appointing seven assistants a court for settling disputes involving less than forty shillings. Provision was also made for a quarterly court of trials with a jury of twelve men.

October 1, 1639: —

"It is ordered that every Tuesday in the Month of July, the Judge and Elders shall assemble together to heare and determine all such causes as shall be presented."<sup>5</sup>

This would seem to have been in the nature of a court of appeal. On the same page may be found the record showing that in the quarterly town-meetings, called the quarter courts, "the determination of the matters in hand shall be by major vote, the judge having his double vote who also shall have power to putt it to vote and to gather up the votes."

Arnold, p. 138, calls attention to the fact that the due administration of justice very early occupied the attention of these colonists. He says: —

<sup>1</sup> 1 R. I. Col. Recs. 52,

<sup>2</sup> Ib. 63.

<sup>3</sup> Ib. 60.

<sup>4</sup> Ib. 70,

<sup>5</sup> Ib. 90.

"A formal act of the whole people, passed at this time, will set their regard for justice, and their care in providing for its administration, in still clearer light: —

"By the Body Politicke in the Ile of Aqethnec, Inhabiting this present, 25 of 9: month 1639.

"In the fourteenth yeare of ye Raigne of our Sovereigne Lord King Charles. It is Agreed that as Natural Subjects to our Prince, and subject to his Lawes, All matters that concerne the Peace shall bee by those that are Officers of the Peace. Transacted: And All actions of the Case or Debt shall bee by such Courts as by Order are Here appointed, and by such Judges as are Deputed: Heard and Legally Determined. Given at Nieu-port on the Quarter Day Courte Day which was adjourned until ye Day.

WILLIAM DYRE, SEC.'"

This colony, therefore, established a judicial system of its own, civil and criminal, the year it was founded, four years before any application was made for a charter, and eight years before organization under the charter granted. Evidently the courts of this colony or town did not derive their powers and jurisdiction from the General Assembly, nor from any authority across the sea.

In 1640 a union was brought about between the two colonies on the island of Aquidneck, Pocasset or Portsmouth, and Newport.

"It is ordered that the Chiefe Magistrate of the Island shall be called Governour, and the next Deputie Governour, and the Rest of the Magistrates, Assistants; and this to stand for a decree."

"It is agreed that the Governor and two Assistants shall be chosen in one Towne, and the Deputy Governour and two other Assistants in the other Town."<sup>1</sup>

It will be seen that these two towns were not fused into one town, but that each continued its own separate existence, forming a union only for their common objects, but leaving to each one the management of its own local affairs.<sup>2</sup> This has always been the leading characteristic of American union wherever found. The governor and assistants (now the senators) were invested with the offices of justices of the peace, this being the beginning of a centralized judicial authority. "Particular Courts," consisting of magistrates and jurors, were ordered to be held monthly in each town. These courts had jurisdiction, each in its own town only, in cases not involving life and limb. There was a right of appeal to the quarter sessions,<sup>3</sup> and two annual or parliamentary courts were provided "equally to be kept at the two towns."<sup>4</sup> The laws

<sup>1</sup> 1 R. I. Col. Recs. 100.

<sup>2</sup> *Ib.* 106.

<sup>3</sup> *Ib.* 113.

<sup>4</sup> *Ib.* 106.



were revised. The majority of the freemen of each town were empowered to select men from themselves to lay forth each man's land, and to record their doings in each town. The land titles have been so recorded ever since.

Provision was made for each town to have a joint and an equal supply of money in the treasury, to be drawn by warrant according to the determination of the major vote of the respective towns, each town to bear its proportion of the joint expense.<sup>1</sup> The assessment and the collection of the tax, whether for town or state, was left to each town, and there it has ever remained in Rhode Island.<sup>2</sup>

"It is ordered that each Towne shall have the Transaction of the affaires that shall fall within their own Towne."<sup>3</sup>

Such has ever been the custom in Rhode Island, although no such express statement can be found in either the parliamentary charter of 1643-44, the royal charter of 1663, or the written constitution of 1842. But can it be contended that because no such statement is there thus to be found, therefore the towns of Rhode Island are subject to the unlimited will of its General Assembly? And, as a matter of fact, the towns of Rhode Island have continued ever since thus to manage their own affairs.

At the "General Court of Elections" for Aquidneck (the two island towns of Portsmouth and Newport), held at Portsmouth, 1641:—

"3. It is ordered and unanimously agreed upon that the Government which this Bodie Politicke doth attend to vnto this Island, and the Jurisdiction thereof, in favor of our Prince, is a DEMOCRACIE, or Popular Government; that is to say, It is in the Powre of the Body of Freemen orderly assembled, or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man.

"4. It was further ordered, by the authority of this Present Court, that none be accounted a Delinquent for *Doctrine*; Provided it be not directly repugnant to ye Government or Lawes established."<sup>4</sup>

"15. It was also ordered that a Manual Seale shall be provided for the State, and that the Signett or Engraving thereof shall be a sheafe of Arrows bound up, and in the Liess or Bond, this motto indented: *Amor vincet omnia*."<sup>5</sup>

<sup>1</sup> 1 R. I. Col. Recs. 105.

<sup>3</sup> 1 R. I. Col. Recs. 106.

<sup>2</sup> Gen. Laws. R. I. cap. 36, sec. 3, and cap. 29.

<sup>4</sup> Ib. 112.

<sup>5</sup> Ib. 115.

This is cited because we find here for the first time the use of the word "State."

"The possession of a seal has always been held as one of the insignia of sovereignty or of exclusive rights. Its adoption by a yet unchartered government was significant,"<sup>1</sup>

Here, in 1641, three years before a charter was applied for, and six years before the one applied for was accepted, we find two independent colonies, each reserving its right to local self-government, and to its own court, uniting to form a state; adopting a seal, and adopting a form of government for the whole body consisting of a legislature, a judiciary, and an executive. The significance of this movement has never been adequately recognized. We see that these two towns or colonies, with powers wholly self-instituted, set up a joint government of their own that exercised these rights of sovereignty. The separate, independent towns were the forefathers or precursors of the united colony, and the united colony was their offspring. When Channing, in his *United States of America*,<sup>2</sup> says, "Strong as was the town organization, it was not older than the central governments, and it cannot be said that the state was founded on the towns," he could not have had in mind the settlement of his state.

*Amasa M. Eaton.*

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<sup>1</sup> 1 Arnold, *Hist. R. I.* 149.

<sup>2</sup> Macmillan Co. 1897, 37.



ORAL AGREEMENTS FOR REAL ESTATE  
COPARTNERSHIPS.

THE usual form of the Statute of Frauds provides that no estate or interest in real property, nor any trust or power over or concerning the same, or in any manner relating thereto, can be created or declared otherwise than by operation of law, or conveyance or instrument in writing subscribed in the manner provided for; and that agreements for the sale of real property, or of any interest therein, are invalid unless the same, or some memorandum thereof, be in writing and subscribed in the manner provided for. That statute, at least so far as the express enactment goes, applies as well to transactions between parties proposing or intending to become partners as to transactions between individuals not occupying, or proposing to occupy, a fiduciary relationship to each other. Does this provision of the statute, by its true intent, make invalid an oral agreement for the formation of a copartnership, the express purpose of which is to acquire and hold real property intended to be vested in all of the proposed partners? Or, in other words, can every form of copartnership be created by oral agreement so far as its real property aspects are concerned? And can a trust be predicated in lands upon proof of an oral agreement to create a partnership for the purpose of acquiring such lands, the partnership relation not having existed at the time of acquiring title, unless by said agreement, and no funds having been contributed by the party seeking to establish the trust?

It is true, of course, — and much of the confusion in the cases on this subject seems to arise from a failure to recognize this distinction, — that where parties already occupy toward each other a fiduciary relationship, in the exercise of which one of the parties in violation of his duty acquires an interest in real property that in whole or in part should belong to the other, the estate will be decreed to vest, or at least a trust will be declared, according to the right, and without the usual evidence required by the Statute of Frauds. This is not a case to that extent of a judicial repeal of the statute, but of an express exception made by the statute itself. Indeed, where by *competent* evidence it is shown that a copartnership exists, then it may be shown, even by oral evidence,

and whether the question arise between the parties themselves, or between them and third persons, that its property consists of land. In the same way, where one furnishes the consideration in whole or in part, and another takes the entire title, the latter will, of course, be declared to hold in trust for the one who has furnished the consideration to the extent that he has so done.

These are the perfectly well understood examples of constructive and resulting trusts expressly made exceptions by the words of the statute itself. They do not, at least directly, determine the question of the validity of an oral agreement of copartnership providing for the purchase and ownership of real estate, where the status of copartnership has not previously existed, but is intended to be created by the very agreement, whose validity, because of its real property aspects and because of its oral form, is under consideration. In other words, these exceptions still leave it open to inquire if an oral agreement between A and B to become partners in the acquisition and operation of real property is valid under the Statute of Frauds, and, if not valid in other respects, if it is valid to create the status of copartnership?

The authorities on the point, at least in the arguments employed, are apparently in direct conflict. Those which maintain (whether or not their facts necessarily involve the question) that such agreements are valid though resting in parol, concede that the doctrine adopted by them is modern, and that at one time the rule was the other way. The so-called modern doctrine is traced to the case of *Dale v. Hamilton*,<sup>1</sup> which was an oral agreement for the purchase of a tract of land to be taken in the name of one of the parties who furnished the capital, laid out in lots and resold, the profits to be divided between the parties. It will presently be seen that in cases of that character a special principle may be said to be applicable, but, at all events, the reasoning of the Vice-Chancellor, in the lengths to which he goes, is not satisfactory, and he virtually admits that his decision, to the extent that it goes, is a repeal of the statute.

The objections to the so-called old rule are stated under varying circumstances. Sometimes they occur where the interest is one in profits arising from the purchase and disposition of real property, and where, therefore, no interest in real property, as such, is intended to be created. Sometimes it happens that the fund with which the property is to be acquired is contributed by both parties

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<sup>1</sup> 5 Hare, 369.



to the proposed partnership arrangement in whatever proportions. Sometimes it is said that for all purposes partnership realty is to be regarded as personalty, and that, therefore, the Statute of Frauds has no application to such agreements. And finally it is sometimes said, thus probably furnishing the strongest argument in support of the validity of these agreements, that an agreement for a copartnership to invest generally in real property cannot be said to be one for the creation of an estate or interest in real property, or any trust or power over or concerning it, or in any manner relating thereto, because there is at the time of the making of an agreement no specific property in which the interest is to be created, or at least no ownership by any of the parties to the agreement in any real property upon which the agreement could be said to operate. In the last of which examples, it may be said that the sole purpose of the agreement is to create the fiduciary relationship, and the respective rights and obligations of the parties to it.

(a) As already stated, there can be no question of the rights of the parties where they all contribute to the fund that pays for the real property.<sup>1</sup> But their rights in such a case arise, not from the agreement, or the relationship of the parties, but from the contribution of the purchase-price. It is the ordinary case of a resulting trust. It is evading the question to call the trust constructive, because the fiduciary relationship does not exist unless the agreement intended to create it is valid, and that is the very question to be determined. Where, therefore, pursuant to an oral agreement, the purchase is made and title is taken in the name of one of the parties, the interest of the others will be found to be determined, not by the provisions of the agreement in question, but by the amount of the respective contributions to the fund which has been used to pay for the property. Indeed, there is no necessity for any agreement at all in such cases. Thus, where one orally agreed with three others to buy land on joint account, each to have one quarter, and all to contribute in equal amounts to the purchase-money, and one of them, violating the agreement, procured from the owner a bond for the conveyance to himself of two fifths of the property, and to each of the others one fifth of the property, it was held that no resulting trust would attach to such two fifths in favor of the other parties.<sup>2</sup>

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<sup>1</sup> *Fairchild v. Fairchild*, 64 N. Y. 471.

<sup>2</sup> *Bailey v. Hemenway*, 147 Mass. 326.

And Morton C. J., writing the opinion, says that a resulting trust depends upon the fact that the money of the person claiming it was actually used in the purchase, and that his rights cannot be enlarged by any future payments or tenders, even though made pursuant to the terms of the oral agreement; and he quotes from Chancellor Kent to the effect that "the trust results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of the money, and on no other ground." On the other hand, of course, if an oral agreement of copartnership were made to purchase a certain piece of real property, and the proposed copartners contributed to the fund which was used in the purchase, title being taken in the name of one of them, with or without actual fraudulent intent, a trust would result in favor of the others according to the exact amount of their contributions, even though the agreement were invalid for all purposes, and therefore ineffectual to create the status of copartnership. It is not that the oral agreement to form a copartnership is valid. It may be that the relationship of copartners was not created by it at all. It is the contribution towards the purchase-money that makes the co-proprietorship, irrespective of the agreement, and, it may be said, in spite of the agreement, or without any agreement, so far as may be necessary to determine the extent of the interests.

(b) Neither is the question to be confused with the one that arises where, the status of copartnership having been *previously* created by whatever form of valid agreement, one of the copartners thereafter purchases real estate within the scope of the partnership agreement. That condition of things calls for the application of the doctrine of constructive trusts, or, in certain cases, of both the doctrines of constructive and resulting trusts; that is to say, where one partner takes title in his own name to such real property and expends his own funds, it is only a case of constructive trust evolved out of the fiduciary relationship. A court of equity imposes the trust so as to nullify the breach of confidence. But where one partner, in acquiring title in his own name to such real property, uses partnership funds, there is not only room for imposing (constructing) the trust, because of the fiduciary relationship, but for declaring the resulting trust, because the partner attempted to be excluded has, by virtue of his membership in the partnership, provided part of the purchase-money. If his contribution to the partnership fund is different in amount than the interest secured to him by the terms of the anterior valid agree-



ment of copartnership, his interest in the property acquired will, of course, be governed by the terms of that agreement. Such cases do not tend to throw any light upon the question of the validity of oral agreements to form copartnerships for the acquisition of real estate. "The agreement to put the land into the joint stock was made before the firm had any being, and the partnership fund did not pay for it."<sup>1</sup> "It is true that a trust in lands cannot be predicated upon proof of an oral agreement to create a partnership for the purpose of purchasing and handling or improving such lands, the partnership relation not having existed prior to acquisition of title, and no partnership funds having been invested in the property. To recognize a trust in such cases would be to abrogate the Statute of Frauds in this particular."<sup>2</sup> "Proof of a partnership for the purpose of buying and selling lands presents a different question from that which arises when an *existing* partnership purchases land for its use."<sup>3</sup>

(c) For the purposes of the narrower question under consideration, it may be conceded that where, by the oral agreement in question, the interest of one of the proposed partners is not to be in the real property, but only in the profits that may be derived from its purchase and sale, the statute has no application. Such agreements do not really contemplate real property partnerships at all. Perhaps the most satisfactory definition of a partnership ever formulated is the one recently suggested in the February, 1899, number of the American Law Register, at page 127, to the effect that a partnership is an association of persons to carry on business together as *co-proprietors*. In the case just referred to, there is no co-proprietorship at all. The joint interest is not to be in the real property, but only in the profits derived from its purchase and sale. There is no agreement to vest, in all of the parties, any estate or interest in real property, and the transaction therefore is one outside of the purview of the statute. It may, of course, as a practical matter, often be difficult to determine whether by the agreement in question it is intended that the interest should be in the profits, or be in the property, but that does not affect the soundness of the distinction.

Thus it was held in *Snyder v. Wolford*<sup>4</sup> that an oral agreement by which one is to negotiate the purchase of land, and the other is to pay the price and take title in himself, and providing that

<sup>1</sup> Sharswqod, J., in McCormick's Appeal, 57 Pa. St. 54.

<sup>2</sup> Kayser v. Mongham, 6 Pac. Rep. (Col.) 803.

<sup>3</sup> Fairchild v. Fairchild, 64 N. Y. 471. <sup>4</sup> 33 Minn. 175.

when the land is sold the profits are to be divided between them, is not within the statute. It was said by the court that the agreement manifestly did not contemplate that plaintiff should have any estate or interest in the land, or be interested in any way in the transaction, unless upon a sale there should be a profit, and that the agreement was rather one of employment or agency than for an interest in real estate. Upon this construction the agreement, of course, was not one for the formation of a copartnership at all. And yet this is one of the cases relied upon as showing the tendency of modern decisions in the direction above pointed out. So, too, in *Coward v. Clanton*,<sup>1</sup> under a substantially similar state of facts, the court said that the contract, as between the parties to it, did not in any way affect the title to real estate. "The subject-matter of the contract was the *profits* to be realized from sales made, and the controversy here is as to such profits and the adjustment of accounts as between the partners." Upon a second appeal, however, in the same case,<sup>2</sup> it was said that the agreement between the parties constituted no partnership at all, and that sharing the profits was no test. The same distinction is pointed out by Cooley, C. J., in *Carr v. Leavitt*:<sup>3</sup> "The contract did not contemplate that, in any contingency, an interest in the lands was to be conveyed to, or vested in, the plaintiff. It contemplated only that in a certain event the plaintiff should receive a share of the moneys that a sale of the land would bring. His interest was, therefore, in these moneys, and not in the land itself."<sup>4</sup>

(d) Then there are the cases of oral agreements to form partnerships for *trading* in lands rather than for permanent investment or operation, but where it is intended that the title to the lands, while held by the partnership, should be in all the partners; that is to say, making the partners co-proprietors in the lands until they are disposed of. The question, of course, by the introduction of this element of co-proprietorship, becomes more complicated. It might certainly be said that such an agreement is no different, from the point of view of the Statute of Frauds, from the one where A orally agrees with B (no question of partnership being involved) to purchase a piece of realty, and then to convey to B a certain undivided interest therein for the proportionate part of the cost. If A, pursuant to that arrangement, or in violation of it, thereupon acquires title in his own name, furnishing the

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<sup>1</sup> 79 Cal. 23.

<sup>2</sup> 55 Pac. Rep. 147.

<sup>3</sup> 54 Mich. 540.

<sup>4</sup> *Babcock v. Read*, 99 N. Y. 609, *acc.*



entire consideration, and then repudiates the arrangement, will it be said that any trust in favor of B arises by implication of law? The authorities are quite uniform to the contrary, and they go upon the ground that an interest in land is intended to be created by such an agreement. It is, of course, not the ordinary case of an agreement by an owner of land to convey it or part of it to another, but, as was said by the Supreme Court of the United States in *Dunphy v. Ryan*,<sup>1</sup> "it is a contract for the sale of lands, and not being in writing signed by the vendor is void. The circumstance that the defendant, not owning the land which he agreed to convey, undertook to acquire the title, instead of taking the case out of the statute, brings it more clearly and unequivocally within its terms."

But what is the distinction in principle between an agreement by A to purchase and then transfer a part to B, and one to form a copartnership between them for such a purchase? As already stated, the difference is not one arising from the existence of a fiduciary relationship, because, unless the agreement intended to create the relationship is valid, there is no such relationship. Where the partnership feature is eliminated, the authorities are found to go great lengths in applying the statute and vindicating its spirit. We do not then hear anything of a protest against using the statute as an instrument of fraud. All so-called ethical considerations are ignored, protest is made against "frittering away" the statute, and we are told, and of course told correctly, that it is not fraudulent to refuse to carry out an agreement that cannot be enforced because it is invalid under the statute. "The mere failure to perform a parol agreement which was made in good faith is not fraud."<sup>2</sup> "A party in no legal sense commits a fraud by refusing to perform a contract void by its provisions."<sup>3</sup>

Thus, where plaintiff and defendant made an oral agreement that defendant should bid off an estate about to be sold at auction, for the joint account of both parties, in equal shares, and defendant bought and took title in his own name, it was held that plaintiff could neither enforce a trust in his favor in the land after it was conveyed to the defendant, nor maintain an action at law for a breach of the agreement.<sup>4</sup>

The same question was involved in a later Massachusetts case,<sup>5</sup> where the court said: —

<sup>1</sup> 116 U. S. 491.

<sup>2</sup> *Feeney v. Howard*, 79 Cal. 525.

<sup>3</sup> *Levy v. Brush*, 45 N. Y. 589.

<sup>4</sup> *Parsons v. Phelan*, 134 Mass. 109.

<sup>5</sup> *Emerson v. Galloupe*, 158 Mass. 146.

"The plaintiff must recover, if at all, on the fact that, having agreed to act in part for them, defendant has violated that agreement and acted solely for himself. The agreement was within the statute, and no trust in the equitable title can be enforced unless it arise by implication of law. It is contended that such cases fall within the exception of trusts which may arise or result by implication of law; but we cannot construe that exception as extending to a trust which arises from the plain words of a contract merely because the words promise it by implication instead of setting it forth at length. When a man promises to buy land for another, he promises to hold it for that other after he has bought it, and it makes no difference in the applicability of the statute whether the latter promise is uttered in separate words or not."<sup>1</sup>

When the agreement is one not simply for the purchase of real property, but for the formation of a copartnership in connection with its acquisition and disposition, what substantial distinction is made? It may be admitted that the agreement has two aspects, — one the joint purchase of realty, and the other the formation of the copartnership; and that, if efficient to create the status of partnership, the validity of its other features, from the point of view of the statute only, becomes a matter of no importance. But there would seem to be no warrant for sustaining that part of it that creates the relationship and rejecting the rest of it. It may be that the relationship may develop out of the subsequent acts of the parties, and, having been created, impress its attendant incidents upon the transactions that ensue upon such creation, but that can have no bearing upon the validity of the anterior agreement. The fallacy lies in the failure to inquire in each case if the existence of the copartnership has preceded the acquisition of the realty by the party who is attempted to be charged with the trust. The fiduciary relationship is lacking, up to the time of making the agreement under consideration, so that the case would seem to be on all fours with the two Massachusetts cases above referred to. This distinction is well illustrated in *Raub v. Smith*,<sup>2</sup> which was a case of oral agreement to invest in land, and, if found to be valuable, to form a copartnership to work it. Defendant refused to form the partnership, purchased the lands in his own name, sold them and refused to share the profits. Relief was denied, on the ground that the contract for the purchase of the land was included in the contract to engage in the partnership, and is made the basis thereof.

<sup>1</sup> *Acc. Walker v. Herring*, 21 Gratt. 678; *Clarke v. McAuliffe*, 81 Wis. 104; *Speyer v. Des Jardins*, 144 Ill. 641.

<sup>2</sup> 61 Mich. 543.



We were considering at this stage the case of an agreement for the formation of a partnership for *trading* in lands rather than for permanent investment or operation, because that distinction is made squarely by some of the cases. Thus in *Bates v. Babcock*,<sup>1</sup> it was said that a partnership formed for the purpose of buying and selling lands may be formed in the same manner as any other, and that its existence may be established by the same character of evidence. "It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement,—that sense in which the *beneficiary*, under a trust for the sale of real estate and payment to him of the proceeds of the sale, has an interest in the land; but it is only a pecuniary interest resulting from the sale, and a right to have the land sold, rather than an interest in the land itself. . . . A bill for the conveyance of the lands could not be maintained under such an agreement, but, by reason of the acts of the parties thereunder, an equity would be raised in their behalf which would be superior to the legal title held by him to whom the land was conveyed, and would control that title in subordination to this superior equity." It is said by the court that under such an agreement it is invariably held that an action for the division of the profits can be maintained after they have been received, whereas, if the agreement were invalid at the outset, they could not form the basis of such an action. This is a refreshing departure from the usual unintelligible declaration that the Statute of Frauds has no application to an executed agreement. Many judges would have rested their decision upon that doctrine, not realizing that by so doing they in effect enforce agreements invalid under the Statute of Frauds. The court in that case evidently meant to make a distinction between oral agreements of copartnership for trading in lands and those formed for the acquisition and holding of lands, for they say: "That the agreement between the parties did not contemplate any transfer of the land, or of any interest therein, to the defendants, or either of them, but had for its object only a division of profits and losses which would remain after its sale, is shown by a consideration of the complaint, and also by the direction of Babcock to the plaintiff, while negotiating the agreement, to 'sell it off as soon as you can, pay up the debts, and divide the pro-

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<sup>1</sup> 95 Cal. 475.

fits.'” With the construction given by the court to the facts, the agreement is no different from that of *Snyder v. Wolford*, *supra*, where it was expressly provided that title should be taken in the name of one of the parties exclusively, and that the entire purchase-money should be furnished by him.

The inference from the reasoning of the court is that if, by the terms of the agreement to form a copartnership, it had been intended to vest in all the parties the title to the real estate as it was acquired, the court would have declared the agreement to be invalid under the statute. They say, in effect, that, because the interest of the plaintiff was to be one in profits and not in the realty itself, the statute has no application. And upon no other theory is it possible to explain the statement of the court that a bill for the conveyance of the lands could not be maintained, under the agreement before the court, by one of the partners against the other holding the title.

(e) A further objection is made to applying the Statute of Frauds to these agreements for real property copartnerships, that at the time of the making of them there is generally no question of the transfer of land by one to another of the parties to the copartnership proposed to be formed, and in making this objection it is sometimes conceded that where the property intended to form part of the copartnership assets is then in one of the proposed partners the statute would apply.

In *Chester v. Dickerson*,<sup>1</sup> where the oral agreement was sustained, it is said: “But suppose two persons by parol agreement enter into a partnership to speculate in lands, how do they come in conflict with the Statute of Frauds? No estate or interest in land has been granted, assigned, or declared. When the agreement is made, no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners, and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute.” It might again be said here that it is begging the question to assume that the agreement is effective to create the status of partnership. The parties to the agreement may, after making it, in some competent way assume the attitude

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<sup>1</sup> 54 N. Y. I.



of copartners, or they may proceed upon a mistaken notion that the agreement was valid and accomplished its purpose, but that cannot retroactively make valid an agreement that at the time of its making was invalid. Of course, if the agreement is valid that is an end of the matter, because, the relationship existing, property afterwards acquired pursuant to it, even without the contribution of joint funds, must belong to the partnership. But it would seem as if the above reasoning were sufficiently answered by the argument in *Dunphy v. Ryan*, *supra*, that the circumstance that the title to the lands proposed to be owned has not yet been acquired, "instead of taking the case out of the statute, brings it more clearly and unequivocally within its terms."

In *Henderson v. Hutson*,<sup>1</sup> an oral agreement that purchase of lands should be made, and that the plaintiff should be deemed a partner in the purchase, was held void, the court saying: "Although, in the case before us, it was not immediately between a buyer and seller of land, yet it is within the mischief intended to be guarded against by the statute, which, being a remedial one and intended to prevent a growing evil, ought to be liberally construed."

And again it may be said that, if the objection in question constitute a distinguishing principle, the same rule should apply where A and B, without intending to form a copartnership, agree that one of them will acquire a piece of property, in which each shall have an interest according to contributions proposed to be made to the cost. For here, too, the fact is that when the agreement is made no lands are owned by either, and neither party at the time attempts to convey to the other; and yet the case of *Parson v. Phelan*, *supra*, and others previously cited in the same connection, in holding such agreements to be invalid, represent no dissent from the general current of authority. It is difficult to see what difference in principle there can be between such an agreement to acquire lands as tenants in common, and one to acquire them as partners where the partnership relation had not previously existed.

It would seem, therefore, where an oral agreement is made to form a copartnership to purchase real estate, in which each of the partners should have an interest, and one of the parties thereafter, before anything else is done to constitute a copartnership, acquires title to real estate within the scope of the copartnership, in his own name, and contributing the entire purchase-money, that the

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<sup>1</sup> 1 Munf. 510.

other party, the one excluded from the purchase, is in no position to have a trust declared in his favor. A very learned exposition of that doctrine is made by Judge Story in *Smith v. Burnham*,<sup>1</sup> where, with his usual very learned review of the cases, he says: "It was contemplated, according to the very structure of the bill itself, that, upon every purchase made under the express contract of partnership, the plaintiff should have an interest in the lands purchased to the extent of one moiety for his share in the partnership. Now, if the purchase was made in the name of Burnham as to one moiety, it was to be in trust for the plaintiff. By the Statute of Frauds, all estates made or created by parol, and not put in writing, and assigned by the party making or creating the same, are mere estates at will. . . . If the agreement could be treated as a sale by the defendant to the plaintiff of any interest in the lands to be purchased, it would be within the statute. If it could be treated as the case of an estate created in lands, it would be a mere estate at will, which would defeat the whole intention of the agreement, and the whole object of the bill. I incline to think that it properly falls under neither of these predicaments, but that it is a case of the declaration or creation of a trust in lands not arising or resulting by implication or operation of law. The trust arises *eo instanti* upon each purchase, and is then to attach, if at all." The suit was one in which it was claimed that plaintiff and defendant entered into an agreement to become partners in the business of purchasing and selling lands, upon a joint capital to be furnished by both, and the profits and losses to be equally shared, and the question of the creation of the partnership relation by the agreement itself was directly involved.

In *Caddick v. Skidmore*,<sup>2</sup> it is said by Chancellor Cranworth that "an agreement to the effect that the plaintiff and defendant would become partners in the colliery, for the purpose of demising it upon royalties which were to be divided in some proportion between them, would, in my opinion, be an agreement not capable of being enforced unless proved by such evidence as is required by the Statute of Frauds, for there does not appear to be anything to take this case out of the operation of the statute." And the Chancellor proceeded expressly upon the ground that the agreement was one for the purchase of an interest in land. The circumstance that one of the parties was, at the time of the making of the agreement, the lessee of the mine, does not appear to have had any weight with the court.

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<sup>1</sup> 3 Sumn. 435.

<sup>2</sup> 2 De G. & J. 52.



In *Bird v. Morrison*<sup>1</sup> the court calls attention to the many successful invasions upon the statute, but insists that none of them goes to the extent of holding a bald parol agreement for a partnership in real estate, as such, may be shown to create a trust in land held by one of the parties under a deed absolute on its face. "What safety would there be if the proposition were once established, that by alleging a partnership the Statute of Frauds is entirely evaded, and parties may then prove whatever interest in land they pleased by parol, against the absolute title of the deeds? Our conclusion may be thus stated: An agreement for a partnership to consist in dealings in real estate is within the Statute of Frauds, and void unless in writing." Expressions are found in cases, of which *Allison v. Perry*<sup>2</sup> and *Meagher v. Reed*<sup>3</sup> are instances, to the effect that where a partnership is *constituted* under a parol agreement it may be shown that its property consists of land, and it may own, possess, and enjoy the same. It is expressions like these that lead to the confusion on the subject. They may be unobjectionable if they mean that the Statute of Frauds can only be invoked in contests between partners themselves, and that third persons may prove by parol evidence that certain property belongs to an apparent partnership, and is affected with partnership equities. And they are wholly unobjectionable, even as to contests between the partners themselves, if it be meant that the evidence is competent, after it has been shown that the partnership was in fact "constituted;" that is to say, legally constituted. But these expressions are seized upon as authority for the doctrine that oral agreements for partnerships to acquire real estate, whatever their scope, and whatever the interest intended to be created in all of the proposed partners, are valid.

The court in *Benjamin v. Zell*<sup>4</sup> seems to regard the matter of intention to create an interest in the land in all of the proposed partners as a distinguishing feature. "An interest in contingent profits, arising from a sale to be thereafter made, does not give an interest in the land itself." That is to say, if the interest were in the land itself, the result would be different.

In *Young v. Wheeler*<sup>5</sup> a demurrer was sustained to a bill by one claiming to be a partner, to obtain a conveyance of an interest in lands on the ground that they belonged to a partnership formed for buying real estate, the bill alleging that the partnership was

<sup>1</sup> 12 Wis. 153.

<sup>2</sup> 22 N. E. Rep. 492.

<sup>3</sup> 24 Pac. Rep. 681.

<sup>4</sup> 100 Pa. St. 33.

<sup>5</sup> 34 Fed. Rep. 98.

formed both by means of personal conversations and by letters. "If it be taken to be a partnership, as alleged by the plaintiff, for buying lands in which the plaintiff was to have an interest, although the title thereto should be taken in the name of the defendant Wheeler, the agreement would, if shown, tend to establish a trust on the part of Wheeler in respect to these lands for the plaintiff; and that cannot rest in parol under the statute."

In *Flower v. Barnekoff*<sup>1</sup> it was held that a valid contract of partnership for the purpose of *speculation* in real estate may be made by parol. It is there correctly said that many of the cases go much further than was necessary in order to admit the proof of the formation of the partnership in the case before the court. "The contract of purchase from Tucker," says the court, "was not secured to hold as land, or with any intention of ultimately vesting the legal title in the partnership, but for the purpose of sale and the acquisition of profits. It was secured simply as an article of commerce and for speculation." The court also refers to an earlier Oregon case in which it was said that the doctrine laid down in *Dale v. Hamilton* was "better adapted to the course of business in this country, where mercantile, manufacturing, and various other partnerships are necessarily compelled, in the course of their business, the investment of their capital, and the collection of debts due them, to become the owners of real property." In other words, expediency dictates the necessity of emasculating a positive enactment.

In *Jones v. Davies*<sup>2</sup> it was held that where several parties unite in the purchase of real estate, not as a permanent investment but as a speculation, and with a view of selling the same for profit, the land will be regarded in equity as personal property, and the oral agreement, though construed to be one of copartnership, will not be held to be within the statute. Having come to that conclusion, it was, of course, proper for the court to add that "in such cases it is immaterial in whose name the purchase is made or the title taken; that the property, wherever the legal title may be placed, will be deemed partnership property, and the parties entitled to the rights and subject to the liabilities of partners."

In *Cameron v. Nelson*,<sup>3</sup> after an intelligent summary of distinguishing principles, it is held that an oral agreement contemporaneous with the conveyance of the entire title from A to B, providing that B was to have a beneficial interest in one half, and

<sup>1</sup> 20 Ore. 132.

<sup>2</sup> 56 Pac. Rep. (Kans.) 484.

<sup>3</sup> 77 N. W. Rep. (Neb.) 771.



was to hold the legal title to the whole, sell the land and pay to A one half the proceeds, was an attempt to create a trust relating to lands, and void because not evidenced as required by the statute. It is interesting to compare this case with those like *Carr v. Leavitt*, *Babcock v. Read*, *Coward v. Clanton*, *supra*.

In *Brosnan v. McKee*<sup>1</sup> it was held that an oral agreement to pay plaintiff a certain sum for negotiating a purchase of certain mills, the title to be in the names of both parties, and for the formation of a partnership in a business to be carried on at said mills was an agreement within the statute. "It is one for the purchase of land, and should have been in writing. The agreement was that the plaintiff was to purchase the land whereon the plaster-bed was located, for both parties, and that said purchase was to be in part for the plaintiff, and the title to the property was to be taken in the names of both parties; and it was this interest, as well as the promise of the partnership in the business, which constituted the consideration upon which the plaintiff relies for recovery."

We have still to consider the argument sometimes used, that the statute has no application to agreements of copartnership, because, as it is said, partnership real estate is always treated as personalty. In *Chester v. Dickerson*, *supra*, it was said: "It is claimed that such an agreement is not affected by the Statute of Frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the Statute of Frauds."

It may here, too, be said at the outset that it is begging the question to call the lands partnership property. They are not partnership property unless the agreement for the formation of the partnership was valid. The weakness of that argument appears when it is somewhat transposed. It amounts to saying that an oral agreement to form a copartnership to deal in lands is effective to create the copartnership because lands belonging to a partnership that has been effectively created are treated, not as lands, but as personalty. In the same way, in *Bates v. Babcock*, it is said

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<sup>1</sup> 59 Mich. 107.

that it is a familiar rule in equity that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement; but no fault is to be found with this statement in the light of its subsequent explanation by the court, where it says that "*upon proof of the existence of such a partnership* the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships;" by proof being meant competent proof. For nothing occurs in the statute to exclude the application of its provisions to the case of parties attempting unsuccessfully to create a copartnership.

It is, however, probably not true, at least in this country, that partnership real estate, except for the payment of debts, is treated as personal property. Partnership real estate remaining after the payment of debts is considered and treated as real estate which would go to the heirs of the partners according to their interests. In England it is said that the rule would probably be otherwise, and that the surplus would go to the personal representatives, on account of the great injustice which would otherwise result from its laws of inheritance.<sup>1</sup> The rule contended for is not one of universal application.<sup>2</sup>

However, as already said, the doctrine, even as contended for by such cases as *Chester v. Dickerson*, *supra*, applies in terms only to partnership property, and cannot justly be said to assist us, even if accepted to the length in which it is stated, in determining if a copartnership was in fact created.

To resume, finally, it may be said: —

(1) That irrespective of any agreement, or the legal title, the trust results in favor of those who contribute the purchase-money, whether they be partners or not.

(2) That if the partnership, or other fiduciary relationship, exist, a trust is constructed in after-acquired realty in favor of him who relied upon that relationship, and who is excluded from the legal title.

(3) That an oral agreement of copartnership which contemplates the taking of the legal title in one of the partners, and the contribution of the entire purchase-price from his own funds, the interest of the other partners to be limited to a share of the pro-

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<sup>1</sup> *Fairchild v. Fairchild*, 64 N. Y. 472; *Black v. Black*, 15 Ga. 449.

<sup>2</sup> *In re Robinson Estate*, 43 Atl. Rep. (Penn.) 207; *Oliver v. Oliver*, 49 S. W. Rep. (Ky.) 473.



fits realized from a sale of the realty, is valid, because not creating an interest in lands, and the agreement establishes the relationship of partners.

(4) That when two parties orally agree that certain realty shall be acquired by one of them, and thereafter conveyed, so that they shall hold the same as tenants in common and not as copartners, the agreement is void, but to the extent that the party complaining has contributed to the cost of the property a trust results in his favor.

(5) That where two parties orally agree to form a copartnership to acquire and hold real estate, an interest in which shall be vested in both of them, the agreement is void and ineffectual to create the relationship; but if one of the parties thereafter acquire the realty, and the other contribute to the cost, a trust results in his favor to the extent of his contribution, and not because of any fiduciary relationship, and the size of his interest is determined by the amount of the contribution, and not by the terms of the agreement.

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## LEASES — COVENANTS OF PERPETUAL RENEWAL.

THE earliest case, and perhaps the most famous one, in which the question of the true construction of the covenant for renewal was distinctly presented for decision was *Bridges v. Hitchcock*,<sup>1</sup> decided in 1715. This case has been cited in most of the subsequent cases, and in some of them exhaustively examined.<sup>2</sup>

In *Bridges v. Hitchcock* the words of the covenant of renewal were: —

“If the lessee, his executors, etc., should at any time thereafter before the expiration of the term demised be minded to renew and take a farther lease of the demised premises, then, upon application made at any time before the last six months of said term, the lessor, his heirs or assigns, should grant such farther lease as should by the lessee, his executors, etc., be desired, without any fine to be demanded therefor, and under the same rent and covenants only as in this lease.”

This was held to be a covenant for perpetual renewal; but the case is clearly not an authority for the proposition, as it seems to have been erroneously supposed to be, that a bare covenant to renew under the same rent and covenants includes a right to have a covenant of renewal inserted in the renewed lease, because “it appears most manifestly that there was MUCH MORE in the case than a *mere covenant to renew under the same rent and covenants*; namely, besides the circumstance of an expenditure by the lessee to the extent of £1800, under a covenant for repairing, there was an *express* engagement in favor of the lessee not for a farther term of the same duration as the original lease, but for *SUCH FARTHER LEASE as the lessee should REQUIRE*, that is, for any lease *renewable or irrenovable for any term he should think fit to insist upon*.”<sup>3</sup> We shall have occasion to refer to this case again in considering some of the later cases.

<sup>1</sup> 5 Bro. P. C. 6.

<sup>2</sup> Argument for Appellant in *Earl of Inchiquin v. Burnell* (1795); 1 Hargrave's Jur. Arg. 421, where the case is very carefully stated; *Tritton v. Foote* (1789), by Lord Chancellor Thurlow, 2 Cox, 174; *Iggulden v. May* (1806), by Lord Ellenborough, C. J. 7 East, 237.

<sup>3</sup> Argument for the Earl of Inchiquin on his appeal to the Irish House of Lords.

1 Har. Jur. Arg 423.



The next case in order of time was *Hyde v. Skinner*.<sup>1</sup> This was an express decision by Lord Chancellor Macclesfield, that a covenant to renew a lease at the same rent and on the same covenants does not import a perpetual renewal.

Lord Macclesfield said on this point: "And though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewing this new lease, forasmuch as then the lease would never be at an end."

This case is reported also in 3 Ridgeway P. C. 393, from the notes of Mr. Melmoth (co-editor with Mr. Peere Williams of Vernon's Reports, and an eminent practising barrister in equity), with a variation in the terms of the covenant to renew which makes a decided difference, and apparently brings the decision of Lord Macclesfield into conflict with the earlier decisions of the Court of Exchequer and of the House of Lords in *Bridges v. Hitchcock*. For Mr. Melmoth's report of *Hyde v. Skinner* introduces into the lease a clause not contained in the report in Peere Williams, namely, that the lessor should, if thereto required, execute to the said William Hyde a further lease of the premises under the like covenants, and at the same rents as were therein contained *for such further term as the said William Hyde should then desire*.

The third case was *Davis v. Taylor's Company*,<sup>2</sup> which was tried at the Rolls in England before Sir Joseph Jekyll. The report is as follows:—

"A lease was made by the defendant to the plaintiff's testator, of a house for twenty-one years; there was a covenant that the defendant should at the end of the first seven years, upon the surrender of that lease, make a new lease for the term of twenty-one years, at the same rent and with the same covenants as were reserved and covenanted in the old lease; the bill was for a specific performance of the covenant, and the question was if the covenant of renewal should be inserted in the new lease? The Master of the Rolls was of opinion it should not, there being no words to show that it was the intention of the parties that the lease should be renewed *toties quoties*, for that in effect would be to give the plaintiff a fee, and therefore decreed the defendant to make a new lease, but without the covenant for renewal."

It will be observed that this case supports in a more unequivocal manner than does *Hyde v. Skinner* the proposition that the covenant to renew is not to be inserted in the renewal lease.

The fourth case was *Furnival v. Crew*,<sup>3</sup> before Lord Chancellor

<sup>1</sup> 2 Peere Williams, 196 (1723).

<sup>2</sup> 3 Ridgeway P. C. 395 (1736).

<sup>3</sup> 3 Atk. 83 (1744).

Hardwicke. It was a lease for lives, and the renewal covenant was: "and the said John Crew for the consideration of the said sum of 68 pounds, etc., shall and will execute one or more lease or leases, under the same rent and covenants as are expressed in these presents, and so to continue the renewing of such lease or leases to Thomas Moore or his assigns," etc.

The words "so to continue the renewing" were considered by Lord Hardwicke very significant and decisive of the case in favor of the lessee, but he also adverted to the circumstance of the stipulation "that the 68 pounds is to be paid at Crewhall or at the place where the said hall now stands" as at least hinting an intention to make the lease perpetually renewable, and quoted with approval Lord Hale's remark in *King v. Melling*, 1 Vent. 232, that the "meaning is to be spelled out by little hints."

Of this case Sir Richard Pepper Arden, M. R., in *Baynham v. Guy's Hospital*,<sup>1</sup> said: "*Furnival v. Crew*,<sup>2</sup> which is relied on in *Cooke v. Booth*, had clear words for a perpetual renewal; which made it impossible to construe it otherwise."

The next case was *Russell v. Darwin*,<sup>3</sup> before Lord Chancellor Camden in 1767.

Here the lease was for the term of ninety-nine years if three persons named should so long live, rendering rent, with covenants, in the events of the death of any one or two of the appointees, to add one or two new lives as the case might be, on payment of certain stipulated fines. Then followed the clause which governed the event which actually happened, "or upon the death of all of them (by name) would, upon payment of 1150*l.*, make a new lease or grant for any three new lives, to be nominated and appointed by the said Richard Russell, his executors, etc., for the like term as was thereby demised, at and under the like rents, covenants, and agreements therein contained."

The plaintiff having applied to the defendants for a renewal and having tendered the engrossment of a lease to them for ninety-nine years, renewable upon the dropping of three new lives, at the old rent, with a covenant for renewal of that lease, in the same words or to the same effect, as had been contained in the original lease of 1705, tendering at the same time the fine of 1150*l.*, and the defendants having declined executing any such lease with any such covenant.

His lordship was of opinion that the defendants were not under

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<sup>1</sup> 3 Ves. Jr. 295 (1796).

<sup>2</sup> 3 Atk. 83.

<sup>3</sup> 2 Bro. C. C. 638, note.



any obligation to grant any further lease than for three new lives only, and that the plaintiff was not entitled to have any covenant inserted for any further renewal, the words of the old covenant not obliging the lessors to grant a new lease, but upon the death of some one of the three persons named in that lease; and they being all dead, the plaintiff could claim no further renewal; and therefore his lordship decreed the defendants, upon payment to them of the fine of 1150*l.*, to grant to the plaintiff a new lease for ninety-nine years, renewable on the deaths of three persons named in the lease, but without any covenant for any further renewal.

The next case was the celebrated one of *Cooke v. Booth*, which came before the Court of King's Bench in 1778.<sup>1</sup>

"This was a case out of Chancery for the opinion of this court, stating, in substance, that Robert Booth by indenture demised certain premises to Otho Cooke for three lives with covenants for renewal 'under the before mentioned annual rent and the same covenants therein contained.'

"This lease bore date the 22d of December, 1749, and there had been successive renewals containing the same clause of renewal, from the time of a former lease, granted by the ancestor of the said Robert Booth, bearing date the 3d of August, 1688, down to the date of the lease in question."

Lord Mansfield, Ch. J., and Ashhurst, J., relied upon the argument that the lessor by making four successive renewals had put his own construction on the covenant and was bound by it. Judges Buller and Willes relied on the authority of *Bridges v. Hitchcock*.

It will be perceived that in so far as this decision is placed on the authority of *Bridges v. Hitchcock* it can hardly be supported in view of the facts of that case; for there was much more in the case than a mere covenant to renew under the same rent and covenants."<sup>2</sup>

The rule of construction adopted by Lord Mansfield and Ashhurst, J., from the acts of the parties, was strenuously opposed by Sir Richard Pepper Arden, M. R., in *Baynham v. Guy's Hospital*,<sup>3</sup> and disapproved of by Lord Eldon in *Iggulden v. May*,<sup>4</sup> by Sir William Grant, M. R., in *Moore v. Foley*,<sup>5</sup> and by Lord Ellenborough in *Iggulden v. May*,<sup>6</sup> and it is said in a note to section 293 of *Greenleaf on Evidence*, "*Cooke v. Booth*<sup>7</sup> has been repeatedly disapproved of, and may be considered as overruled; not,

<sup>1</sup> Cowper, 819.

<sup>2</sup> *Earl of Inchiquin v. Burnell*, 1 Har. Jur. Arg. 423.

<sup>3</sup> 3 Ves. Jr. 295 (1796).

<sup>4</sup> 9 Ves. Jr. 335.

<sup>5</sup> 6 Ves. 258.

<sup>6</sup> 7 East, 237.

<sup>7</sup> Cowp. 819.

however, in the principle it asserts, but in the application of the principle to that case." Evidence of the practical interpretation by the acts of the parties seems to be more appropriately applied to remove a doubt raised by ambiguous language in the description of land conveyed by deed, than in the construction of the covenants thereof.<sup>1</sup>

In the same year, 1778, the case of *Reece v. Lord Dacre* came before Lord Thurlow. This was perhaps the case of Lord Thurlow's which Lord Brougham remembered as preceding *Tritton v. Foote*, but the report of which he could not find, when writing his opinion in *Brown v. Tighe*.<sup>2</sup> *Reece v. Lord Dacre* is reported in 1 Harg. Jur. Arg. 438.

The lessor covenanted to grant a new lease for ninety-nine years "if the two new lives and the old life should so long continue, at the said yearly rent of £20 and hens and salmon on the same days and in the same manner as by the said old lease;" such new lease "to have and contain the same covenants, reservations, provisos, conditions, and agreements."

Upon this lease with this covenant of renewal, the question was, whether in a new lease there should be a covenant of renewal; and the bill was brought to require the insertion of such a renewal covenant.

At first his lordship was for dismissing the bill. But at last he ordered that the cause should stand over to the next Michaelmas term and that the plaintiff should be at liberty to bring an action on the covenant in the then term, and should proceed to try the cause in the next term. But no action was brought, the plaintiff's counsel having advised him to take a lease without a covenant for perpetual renewal, which, indeed, the language of the renewal covenant clearly did not call for.

This case is also stated in substantially the same way in a note of Sir Samuel Romilly, cited in his argument as counsel in *Iggulden v. May* before Lord Eldon in 1804.<sup>3</sup>

He says: "Lord Thurlow seemed strongly inclined that a court of equity ought not to enforce a covenant, such as this, under all the circumstances, appeared to be," etc.

Eleven years later the case of *Tritton v. Foote*<sup>4</sup> came before Lord Thurlow. The lease was for twenty-one years with a cove-

<sup>1</sup> *Stone v. Clark*, 1 Metcalf, 378; *Greenleaf*, Evidence, § 293; *Cambridge v. Lexington*, 17 Pick. 222.

<sup>2</sup> 8 Bligh (N. S.), 272 (1834).

<sup>3</sup> 9 Ves. Jr. 332.

<sup>4</sup> 2 Bro. C. C. 638 (1789), and 2 Cox, 174.



nant to renew for seven years under the same covenants. The bill was for specific performance of the covenant to renew.

Lord Thurlow declared the complainant entitled to a lease for seven years only, and said he had not an idea that the intention of the lessor was to renew the covenant of renewal, or that it could be so construed in a court of equity. Referring to *Cooke v. Booth*, he said: "That case was decided on the acts of the parties themselves, as giving a construction to the clause, and leaves every other case to be determined upon the apparent intention of the parties. . . . Even if the lessor had been entrapped into a covenant which at law must be construed to amount to a covenant for a perpetual renewal at the request of the lessee, I should most certainly have left the lessee to his remedy for damages, being most perfectly convinced that a covenant for a perpetual renewal was the farthest thing from the intention of the parties. It is out of all sight, therefore, to give a party any assistance in this court who comes to ask for a thing of this nature."

In thus holding that the intention of the parties is to govern the question, Lord Thurlow in this case is thought by Lord Brougham<sup>1</sup> to have receded from the high ground upon which he had stood in the former case, because his position in that former case (*Reece v. Lord Dacre* [?]) is supposed to have been that a court of chancery would not decree a specific performance of such a covenant merely because it was a covenant of perpetual renewal.

The next case in order of time was *Earl of Inchiquin v. Burnell* (1794), in the House of Lords of Ireland.<sup>2</sup>

This case seems chiefly remarkable for an ingenious attempt on the part of the counsel for the lessee to impute to the lessor an intention of covenanting for a perpetual renewal of the lease, from the use of the word "reservations" as applied to the fine which the lessee covenanted to pay upon renewal. The attempt failed, the judges holding that the covenant to pay a fine was not a reservation.

In other respects the case seems to have been a clear one in favor of the lessor, as there are no words in the lease pointing to a perpetual renewal, and, on the contrary, there were expressions which indicated that one renewal only was in the contemplation of the parties.

The case is, however, a valuable contribution to the literature of the subject by reason of the thoroughness of the preparation of

<sup>1</sup> *Brown v. Tighe*, 8 Bligh (N. S.), 272 (1834).

<sup>2</sup> 3 Ridgeway, 376.

counsel, some precedents being here collected which are not to be found elsewhere, and which might not otherwise have been preserved, and all the cases up to that date being very elaborately and exhaustively commented upon.<sup>1</sup>

The next case in order of time was *Baynham v. Guy's Hospital*.<sup>2</sup> The decision was given by the Master of the Rolls, Sir Richard Pepper Arden.

After commenting at length on some of the earlier cases, and especially on *Cooke v. Booth*, he said: "I collect, therefore, from these cases, this: that the courts in England, at least, lean against construing a covenant to be for a perpetual renewal, unless it is perfectly clear that the covenant does mean it." A note to the report of this case expresses the rule thus: "A covenant for renewal of such a nature as would virtually lead to a grant in perpetuity will never be enforced in equity where no sufficient consideration for such a grant appears, and where the parties have not expressed themselves in language devoid of all ambiguity."

In *Moore v. Foley*,<sup>3</sup> Sir William Grant, Master of the Rolls, quoted with approval the above language of his predecessor in *Baynham v. Guy's Hospital*, and added: "There being no clear words in this case, nor any words relative to perpetual renewal, but the parties themselves having limited it, the question is, whether the proviso that the renewal shall be under the same rents, covenants, and conditions as the first lease shall, in the absence of more positive stipulation, amount to a perpetual renewal. Upon *Tritton v. Foote* and *Russell v. Darwin*, I am bound to hold that a covenant for renewal under the same covenants does not include the covenant to renew, but that it means only a second lease, not a perpetuity of leases."

The fullest and clearest explanation of the reasons for the rule, amounting to a demonstration of its soundness, is by Lord Ellenborough, C. J., in *Iggulden v. May*.<sup>4</sup>

The opinion is too long to be quoted from at much length here, but perhaps the gist of the matter may be given in a short quotation. He said: —

"The case necessarily resolves itself into this question, namely, whether a covenant to grant a new lease with *all covenants* can be satisfied by a lease with *all covenants except the covenant for renewal*. The argument, that a covenant for a lease with *all the covenants* cannot be

<sup>1</sup> See the report in 3 *Ridgeway*, 376, and especially, *The Argument for the Earl of Inchiquin on Appeal*, etc., 1 *Har. Jur. Arg.* 423.

<sup>2</sup> 3 *Ves. Jr.* 295 (1796).

<sup>3</sup> 6 *Ves. Jr.* 232 (1801).

<sup>4</sup> 7 *East*, 237 (1806).



satisfied by a lease with *all but one* will have no weight if, according to the fair construction of the lease, that one covenant should be found to have nothing to do with the subject-matter to be granted. The covenant is, 'at the end of 18 years of the term of 21 years' granted by the lease, to grant 'A new lease for the time and term of one-and-twenty years with All covenants, grants and articles, *as in that indenture contained*. The subject-matter therefore is *one* lease, not many; for *a* new lease is the same as *one* new lease; and if the parties intended to contract for one lease, there can be no doubt that the covenants to be introduced must be commensurate with the duration of such lease, and suited to the subject-matter of the grant. . . . The case on the part of the plaintiff supposes that it was the intention of the parties to express what, if they had so intended, might have been expressed, without difficulty or ambiguity, by words which would have obviously occurred to the most inexperienced draftsman. Had the words 'and so from time to time' been added after 'at the end of eighteen years of the said term of twenty-one years or before,' this design of the parties would have been easily and unequivocally pointed out."

The next important case came before Lord Chancellor Eldon in 1807. It was *City of London v. Mitford*.<sup>1</sup> The circumstances of this case were complicated, and there is in it no clear discussion of the subject under consideration here, but the rule above stated is reaffirmed in the note, which is as follows: "Covenants for perpetual renewal, if fairly entered into and distinctly expressed, are, no doubt, valid; but if the language of such covenants be not perfectly unambiguous, a court of equity will never adopt a construction which would lead to a perpetuity of the leasehold interests."

In 1823 the case of *The Copper Mining Company v. Beach*<sup>2</sup> came before Sir J. Leach, V.-C.

The covenant for renewal was in these terms:—

"That he, the said Thomas M. Talbot, his heirs and assigns, in consideration of the sum of £400 paid by the said Governor and Company would . . . always at any time, when and as often as the said Governor and Company, their successors, etc., should and would request the same, by indenture under his or their hands and seal, lease, . . . let, etc., all and singular the premises, etc., for the further term of thirty-one years; in which said new lease or leases were to be contained and inserted the same rents, payments, reservations, covenants, articles, clauses, provisos, and agreements as were thereinbefore mentioned and contained."

The Vice-Chancellor held that the plaintiffs were entitled to a perpetual renewal of the lease.

<sup>1</sup> 14 Ves. 41.

<sup>2</sup> 13 Beav. 478.

In *Browne v. Tighe*, in the House of Lords,<sup>1</sup> Lord Brougham states the general rule under consideration as follows:—

“That a covenant, to receive the construction of perpetual renewal, must be plain and distinct, and such as to bear no other construction without force and violence done to the words and the context, is a proposition of law which is both borne out by principle and is sustained by the decided cases.”

In *Hare v. Burgess*,<sup>2</sup> in a covenant to renew, under certain contingencies, the words were, “at the same rent and with and subject to the same covenants, provisos, and agreements, including this present covenant, as are contained in the original lease.”

The Vice-Chancellor, Sir W. Page Wood, said: “The court is not at liberty to do violence to the words of an instrument in order to carry into effect what is merely a presumption. So in a case like the present, giving full weight to the argument that there is a presumption against construing a covenant so as to amount to a covenant for perpetual renewal,—that *prima facie* a lessor shall not be taken to have intended to enter into such a covenant; still there may be in the instrument expressions indicative of such an intention; and if there be, the court will not force the construction, but will give effect to what appears to have been the lessor’s intention.”

The covenant was held to be one for perpetual renewal.

The latest English case to which I will refer is *Swinburne v. Milburn et als*.<sup>3</sup> The head-note is as follows:—

“In construing a covenant in a lease, for the purpose of ascertaining whether it is a covenant for perpetual renewal or not, the same rule of construction applies as in construing any other contract, and the rule is that the intention of the parties to the contract is to be ascertained from the language used. When the language used is obscure, the presumption is against a covenant for perpetual renewal; but when the language is clear, this presumption has no application.”

Brett, M. R., and Bowen, L. J., delivered opinions which fully justify the reporter’s note, and it will be noted that this modern English rule is more liberal in favor of the covenant than that formulated by Lord Brougham. See also *Ex parte Clarke*,<sup>4</sup> and article in the *Irish Law Times*, vol. xviii. 235, “Covenants for Perpetual Renewal of Leases.”

The earlier English rule, however, appears to have been followed in the United States.

<sup>1</sup> 8 Bligh (N. S.), 272 (1834).

<sup>3</sup> 50 L. T. (N. S.) 311 (1884).

<sup>2</sup> 4 Kay & J. 45 (1857).

<sup>4</sup> 6 Irish Reps. Eq. 51.



*Muhlenbrinck v. Pooler*<sup>1</sup> contains an interesting review of some of the early English cases. The lease in that case stipulated for a renewal, and continued: "The new lease shall contain covenants, conditions, and agreements the same as those herein contained." It was held that the covenant for renewal was not to be inserted in the new lease.

The case contains an instructive commentary on the English cases. Referring to the above quoted clause, Judge Daniels says:—

"It is upon this stipulation that the tenant predicated his right to a new lease, identical with the first, for a second leasehold term of the property. And authorities have been relied on, which, if they could at the present time be followed, would sustain this claim."<sup>2</sup>

"*Bridges v. Hitchcock* was afterwards followed in *Furnival v. Crew* (3 Atkyns, 83), and in *Clark v. Booth* (2 Cowper, 819). The point was also considered in *Iggulden v. May*, 9 Ves. 324, but it was left undecided by the Chancellor, who suspended the action until a new trial could be had, and a construction given to the lease in an action at law. The trial afterwards took place, and the court held that the tenant was not entitled to an indefinite renewal of the term, but that he was limited to one additional term of twenty-one years, notwithstanding the fact that the lease provided that the succeeding lease should contain 'all covenants, grants, and articles as in said indenture or lease were contained, and particularly such covenant for renewal as is contained therein.'"<sup>3</sup>

This is an extreme decision, marking a wide departure from the principle upon which the case of *Bridges v. Hitchcock* was decided, both in the Court of Chancery and the House of Lords, and it was characterized by a disposition to restrict the right of the tenant to put one additional term, even when the language of the lease, if full effect had been given to it, would have entitled him to other succeeding like terms in the property.

In the case of *Willan v. Willan*,<sup>4</sup> the lease covenanted for renewal for a further term, and so on forever, or so long as the testator or his assigns, etc., should hold the property, and this was considered by the Chancellor, Lord Eldon, as it certainly was, to be sufficient to require repeated renewals. But there the language of the lease was such as plainly to express that obligation, while in this case it failed to declare the intention of the parties in the same or any other equivalent manner.

"The rule of construction became settled at an early date that a covenant for renewal, or for an additional term, should not be held to create

<sup>1</sup> 40 Hun, 526 (1886).

<sup>2</sup> Citing *Bridges v. Hitchcock*, 5 Bro. P. C. 6.

<sup>3</sup> *Iggulden v. May*, 7 East, 237.

<sup>4</sup> 16 Ves. 72 (1809).

a right to repeated grants in perpetuity unless some sufficient consideration for such grant was made to appear, and the parties had expressed themselves upon this subject in language devoid of all ambiguity."

See also, as to the rule of construction which obtains in the United States, *Banks v. Haskie*,<sup>1</sup> where Miller, J., gives the history of Irish tenures under leases for lives.<sup>2</sup>

Some authorities assert that the covenant for perpetual renewal contravenes the "Rule against Perpetuities."<sup>3</sup>

It is true that the courts lean against such a construction of covenants for renewal in leases as would make them covenants for perpetual renewal; but I submit that the cause of this attitude of the courts is not the influence of the Rule against Perpetuities, or of any analogous principle, but simply a consensus of opinion that the rule of construction adopted in these cases is in accordance with equity, and that its application aids the courts in ascertaining the intention of the parties from the written language they have used; the intention of the contracting parties, when ascertained, governing in the construction of leases as of all other contracts.

I understand that the reason for the existence of the Rule against Perpetuities is the idea, at first vague, but long since fixed as a principle of political economy, statecraft, and jurisprudence, that it is contrary to public policy to allow any unreasonable restraint on the free alienation of land. Now it seems to me that this reason cannot be used in support of the objection to the perpetuity of leasehold interests in land.

<sup>1</sup> 45 Md. 207 (1876).

<sup>2</sup> *Blackmore v. Boardman*, 28 Mo. 420 (1859); *Cunningham v. Pattee*, 99 Mass. 248 (1868); *Brush v. Beecher*, 110 Mich. 597 (1896); *Kellock v. Kaiser*, Wisconsin S. C. (1897), 73 N. W. Rep. 776.

<sup>3</sup> See *Syms v. Mayor of New York*, 50 N. Y. Superior Court Reps. 289 (1884); *Blackmore v. Boardman*, 28 Mo. 420 (1859); *Morrison v. Resignol*, 5 Cal. 64 (1855); *Diffenderfer v. Board of Public Schools*, 120 Mo. 447 (1894).

This view is ably supported by Mr. G. H. Weld in an article in the *Central Law Journal*, vol. vi. 203, entitled "Lease for Years Renewable Forever," who advances the opinion that this covenant can be sustained (paradoxical as it seems) only on the ground that it creates an estate which is held for many purposes to be a fee.

In Ohio, permanent leaseholds are, by statute, made real estate for purposes of descent and distribution, of sales on execution, and judgment liens. *Bates' Annotated Ohio Statutes*, §§ 4181, 5374.

See, contra, Gray on the Rule against Perpetuities, § 320; 1 Washburn on Real Property, § 439; *Gomez v. Gomez*, 88 N. Y. Supreme Court Reps. 566 (1894).

Recent very careful studies of the rule against perpetuities have been made by T. Cyprian Williams, Esq., and by Charles Sweet, Esq., in the *Law Quarterly Review*, vol. xiv. No. 55, July, 1898, vol. xv. No. 57, January, 1899. I do not find in either of these articles anything which gives me reason for believing that the covenant for perpetual renewal of a lease contravenes the rule.



The reversion, although perhaps of little value, is freely alienable, and the lease, subject to such restrictions as the parties themselves have imposed, is assignable.

The Rule against Perpetuities does, no doubt, forbid the postponement of the beginning of the term under such a lease beyond the period of a life or lives in being and twenty-one years.<sup>1</sup> But if the lease does not offend against the Rule as to its inception, its indefinite or even perpetual duration would seem innocent of offence.

In Ireland the dispute has been whether or not a tenant under a lease with the covenant of perpetual renewal, who has failed to pay the stipulated fine, is entitled to relief in equity.<sup>2</sup>

This case is notable as being the one wherein Lord Chief Baron Gilbert first applied his device of septennial fines, which was well suited to the unbusiness-like habits of Irish tenants, who frequently neglected to apply for renewals on the dropping of lives; and for many years, until it was superseded by the Irish Tenantry Act (19 and 20 Geo. III. c. 30), enabled the courts to do substantial justice between landlords and tenants.<sup>3</sup>

*I. Homer Sweetser.*

BOSTON, May 25, 1899.

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<sup>1</sup> 1 Washburn on Real Property, § 439.

<sup>2</sup> *Anderson v. Sweet*, 2 Bro. P. C. 256 (1722).

<sup>3</sup> *Kane v. Hamilton*, Ridgeway's Cases in Parliament, 180 (1784); *Bateman v. Murray*, Ibid. 187 (1785); and *Boyle v. Lysaght*, Vernon & Scriven, 135 (1787), are also important cases on this subject. Other American cases on the Covenant of Perpetual Renewal are: *Abeel v. Radcliffe*, 13 Johns. 296 (1816); *Rutgers v. Hunter*, 6 Johns. Ch. 215 (1822); *Piggott v. Mason*, 1 Paige, 412 (1829); *Banker v. Braker*, 9 Abbott N. C. 411 (1880); *Worthington v. Lee*, 61 Md. 530 (1883); *Clinch v. Perurette*, Canada S. C. Reps. vol. xxiv. 385 (1895).

## A POSSIBLE FUTURE STATUS OF FOREIGN ASSIGNMENTS TO CREDITORS.

SUCH improvements in the administration of justice as consist of the application of a broader and sounder doctrine than heretofore is to be referred, if we mistake not, to no one single cause in so large a measure as to that marvellous advance which the latter half of this century has witnessed in the means of swift communication between the people of distant countries, or between distant parts of our own vast territory. Not the least among the benefits conferred upon mankind by steam and electricity is to be reckoned the visible liberalizing of the bench that comes of a wider acquaintance with men.

Communities that formerly had always lived as strangers are now brought into close contact, with the wholesome result that each gains something substantial from the other. Prejudices are thus gradually dissipated. This change has not been without its influence upon the field of what, for want of a better term, we are accustomed to denominate the "conflict of laws." American judges are coming to show a disposition to treat at least with a milder form of disfavor the party who appears before them as, in the eye of the law, "a foreigner." There appears to be a tendency (not yet very strong or assertive perhaps, but still a tendency) to accord a little more efficacy to the decree of a foreign tribunal than was customary in earlier days. It finds expression in a disposition to question the wisdom of the rigor of the rule as to the force and effect to be given to the action of a foreign tribunal, a rule hitherto based upon the selfish ground that it is the duty of a court to protect "its own people," so to speak, with small regard to the rights of others who live at a distance.

This disposition, it is true, confines itself at present to such "foreign" tribunals as happen to be the courts of a sister state. To this extent at least, it may be said that a conviction has begun to operate that, after all, it is never quite sound, perhaps, to treat the people of another state as "foreigners." It is now nearly half a century since a justice of the Supreme Court of the United States, while at circuit, remarked: "Sitting here as a court of the United States, we do not think that the different states of this nation are to be regarded, as a general thing, in the relation of



states foreign to each other. Especially should they not be so regarded in regard to questions relating to the commerce of the country, which is coextensive with our whole land, and belongs, not to the state but to the Union."<sup>1</sup> Since these weighty words were uttered, the war for the Union has become history, leaving in its train an universally accepted doctrine of the relation of each state to every other state that, in the popular mind at least, has had the effect to banish the term "foreign" to the very narrowest limits.

A radical change in public sentiment takes time, however, to find its way into the courts; and it may be well that it is so. The day has not yet come when no state of the Union can be pronounced "foreign" to the courts of another state; yet such a day will surely be reached. Meanwhile, we may turn to examine what among the theories sustaining the idea of foreign jurisdiction, as between the states, may first be abandoned with but little disturbance to settled rules of law.

It has occurred to the writer, as it doubtless has occurred to more than one judge upon the bench, that the change would be salutary were courts to declare, in a proper case for the purpose, that the distinction between assignments for the benefit of creditors that are voluntary and those that are involuntary (*i. e.* by operation of law), executed in another state, ought no longer to be sustained. The present rule is well expressed by a text-writer as follows: "An assignment by law has no legal operation out of the state in which the act was passed, while a voluntary assignment, it being by the owner, is a personal right of the proprietor to dispose of his effects for honest purposes."<sup>2</sup>

The scope of the present article does not permit of entering upon an exposition of the origin of this distinction, or upon any extended consideration of the arguments put forward to justify it. All that may be stated here is that the general course of reasoning appears to be this: The voluntary act of an owner, who has a right to dispose of his property and does so, deserves to be respected everywhere. When the law, however, undertakes against the owner's will to pass title in his property to an assignee, the act of the court is not effective beyond the territorial limits within which the court exercises jurisdiction. If the power of the court is recognized outside of these limits, it is because of comity and not of right.

<sup>1</sup> Per Grier, J., *Caskie v. Webster*, 2 Wall. Jr. 131.

<sup>2</sup> Burrill on Assignments (6th edition), 361.

The distinction will not bear strict analysis. It is really little more than a thin disguise that the court of another jurisdiction puts on to hide the truth that it is selfishly denying a remedy, so as to give to citizens of its own jurisdiction a chance to collect their claims against the debtor by attachment or other process.

Cömity in this connection, as the text-writers agree, is a term of little or no meaning. It certainly does not signify politeness or courtesy extended by the individual judge, for no such power is possessed by him. Neither does it mean a right. To say the truth, the word is conveniently laid hold of as one of those vague terms like "public policy," for example, under which the court takes shelter, because there is really no other reason to be advanced than expediency.

As for the explanation offered that the decree of a state court has no extra-territorial effect, it is to be remarked that this likewise is a cover to disguise the position that the effect given to the decree is just such as the court of another state sees fit to accord to it. The latter court simply denies the efficacy of the statutes of the sister state. It then proceeds at its pleasure to recognize such statutory effect wherever no injury, in its opinion, will result to its own citizens. The court deals with the question of the propriety of affording recognition, and of applying a known state of facts indisputably proved by the record of a sister state. It is nothing more or less than withholding a remedy in order to favor parties within the jurisdiction. Obviously it is illogical to say that the decree has no extra-territorial effect, and at the same time to give effect to the decree in a qualified way.

So long ago as 1814, a judge of ability and experience, in a discussion of this topic, well remarked: "I take no distinction between the act of law transferring and his own act. He committed the act of bankruptcy, and the law, operating on this, transfers. It works an alienation. It is his own act, what the law does for him, because he must be considered as having originally given an assent to this law which operates the transfer, if it were necessary to recur to the subtlety of first principles in the case, to prove the act of law to be the same thing as a voluntary act on his part."<sup>1</sup> These, to be sure, are the words of dissent; but the judge who took this position had the satisfaction, six years later, to read the following criticism from no less an authority than Chancellor Kent. Speaking of *Milne v. Moreton*, that eminent jurist remarked: "I

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<sup>1</sup> Per Brackenridge dissenting, *Milne v. Moreton*, 6 Birmey, 360.



have examined that case with great care, as well from respect for the character of the court as for the able discussion which it contains; and I can only be permitted to say that, from the view which I have taken, and the impressions which I have received of the law on the subject, it is not in my power to follow the conclusion of the majority of that court." (*Holmes v. Remsen*, 4 Johnson's Chancery, 488.) The Chancellor in this well-known case, with masterly reasoning undertook to establish the English doctrine as the rule in New York. The opinion goes into an elaborate examination of English and other authorities, and reaches the conclusion that the result of an assignment by proceedings at law is, and ought to be, precisely that of a voluntary transfer, and that its full effect should be everywhere recognized. Notwithstanding the weight of a great name, the efforts put forth in this decision failed of success. The American courts have declined to follow, in this particular, the lead of England. Our attitude may be in part accounted for by reason of the existence of numerous state tribunals, each exercising independent authority at a period when the doctrine of the reserved rights of the state had reached its highest expression, and was holding a sway over the minds of men, to a degree not easily to be conceived of by the present generation.<sup>1</sup>

Should the bankrupt law lately put into operation justify the hopes of its friends by remaining permanently upon the statute-book, these questions of state insolvency orders, or of state receiverships, will, it is likely, become of little consequence. It is to be remarked that the incongruities and disadvantages that attended the administration of justice in state courts had much to do with securing the general bankrupt law. Such a law disposes of the objection, which is at the bottom of the readiness of each state to favor its own attaching creditors,—for the practical outcome of the national bankrupt system is to furnish a reasonable equality to

<sup>1</sup> It is worthy of note that scarcely twenty years ago a great lawyer, afterwards distinguished in public life, did not scruple to incorporate into an argument before the Supreme Court of the United States the following unworthy suggestion, borrowed from the utterances of the highest court of the state of New York. Styling Great Britain the great creditor of the world, counsel says that she might, in the language of Platt, J., in *Holmes v. Remsen*, 20 Johnson, 264: "By issuing a commission against a bankrupt merchant in London, spring a net which shall cover all the effects of such bankrupt throughout the world, and draw them all to her own forum for distribution, . . . for the fact cannot be disguised that Great Britain having the most extended commerce, and her merchants and manufacturers *crediting* abroad vastly more than they *owe* to foreign creditors, has a strong and peculiar interest in contending for a rule which draws to herself the distribution of all the effects which her lucrative commerce has dispersed over the globe." *Crapo v. Kelly*, 16 Wall. 617.

creditors in all parts of the country. In the light of what such a law accomplishes one may readily perceive how a broad interpretation of the relation of the states to each other, in respect to an assignment of the property of a debtor by a decree of the state court, sitting at the domicile, may upon principle work out perfectly just and equitable results. What has really been effected is that the people of the United States, through Congress, have assented to the propriety and justice of such an assignment, instead of the same people, through their several state organizations, coming into a like agreement.

Of course, it is to be understood that in speaking of an assignment of property, personal property is meant. There seems to be no sufficient reason, however, why in the fulness of time general consent may not be had to the doctrine that the court of a state can transfer out of the owner title to his land, situated in another state, provided that the usual requirement be retained of having a decree recorded in the registry where the land lies. To render the exercise of such a power effective legislation would be needed. In order to arrive at harmony of action in an undertaking where so many state legislatures are concerned, of course time and patience and a never-dying hope would have to combine. We are not so sanguine as to say that such a task can be accomplished. We are only insisting, at present, that there is really no difference in principle between personal and real estate, so far as the action of a court is concerned that has plenary jurisdiction over the person of the debtor, provided that courts shall ever arrive at the determination to carry out to its logical results the sound theory that in such cases the act of the law is a full substitute for the voluntary act of the owner.

It is neither wise nor profitable, in contemplating a reform in the administration of justice, to venture far into the future. The conservative habit of the lawyer, one needs not say, is grounded in good sense. It is moreover essential to that steadiness of action by which only can safety be insured to private rights. Yet there is going on silently and slowly a change and growth in the field of judicial labor—a progress toward the ideal standard of perfect justice. The hints which we have ventured here to submit (for they are nothing more than hints),<sup>1</sup> are offered in full confidence

<sup>1</sup> The reader may be interested to turn to a valuable article contributed to these pages by the late Judge Lowell, entitled "Conflict of Laws as Applied to Assignments for Creditors." 1 HARVARD LAW REVIEW, 259 (January, 1888).

"The law of Receivership," by John W. Smith (Chicago, 1897), is a recent work



that the day will come when not a vestige shall be left of the theory that in any possible view two states of this Union can be considered as foreign to each other.

*Frank W. Hackett.*

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that evinces a thorough study and a capable handling of the subject. See page 166 for an expression of views with which the suggestions, as above set forth, fully accord.

THE TASK OF THE JURY IN THE CASE OF  
MRS. MAYBRICK.<sup>1</sup>

IN Liverpool, in August, 1889, Florence Elizabeth Maybrick was tried and convicted of the murder of her husband, James Maybrick, by poisoning with arsenic. During the long popular agitation and professional discussion<sup>2</sup> concerning the case, the difficult task of trying to give impartially an abstract of the evidence is not known to the writer to have been attempted. Therefore the following results of an analysis of the reported testimony are here presented in the order of time to aid an appreciation of the trial. It is, of course, not pretended to express any medical opinion, but it is attempted to treat the medical testimony as the jury may reasonably have looked at it. It is not intended to make a case for either side, although the verdict is considered with respect.

The jury is commonly supposed to have been much influenced by the judges's expression of moral aversion towards the prisoner. Certainly the summing up by that able man, to whose services and misfortunes no lawyer can be indifferent, showed a conflict between his judicial desire to be impartial and his characteristic inclination to pronounce moral judgments. Yet afterwards, when writing of how rare false convictions were, he said of this case that "it was the only case" of almost a thousand tried before him in five years "in which there could be any doubt about the facts."<sup>3</sup> Nevertheless the jury heard the evidence, and, although the bias of the summing up remains an essential question in the case, it is not certain that their action would have been different even if the summing up had been unbiased. One of the chief elements in the value of the case is its bearing upon verdicts of guilty after conflicting medical testimony. Omitting the summing up, how can the verdict be explained?

Mrs. Maybrick was a young American of respectable family,

<sup>1</sup> Before the late Mr. Justice Stephen. Counsel, Mr. J. Addison, Q. C., M. P.; Mr. W. R. M'Connell, and Mr. Thomas Swift for prosecution; Sir Charles Russell, Q. C., M. P. (now Lord Chief Justice of England), and Mr. Pickford for defence. Report in *Liverpool Daily Post*, 1st to 8th Aug., 1889, inc.; *Levy's Crim. Appeal* (1899).

<sup>2</sup> See *Levy*, *MacDougall's M. Case* (1891), and *United States Pub. Doc.*

<sup>3</sup> *Stephen's Gen. View Crim. Law* (1890), p. 174. Mental infirmity led to his resignation, 7th April, 1891. *Life*, by L. Stephen, p. 478. See p. 447.



who, about the age of eighteen had been married in July, 1881, to James Maybrick, an English cotton merchant, then about forty-two years old. They had two children within a few years afterwards. They lived in Liverpool.

*Maybrick's Health and Habits.* — Maybrick had before the marriage lived in Norfolk, Virginia, where he had had chills and fever, and had used arsenic either as a medicine or a stimulant, or both. Mrs. Maybrick's physician, Dr. Hopper, of Liverpool, first attended her husband in 1882, and afterwards, during the next seven years, saw him about fifteen or twenty times. Dr. Hopper thought Maybrick a very healthy man, although he complained of occasional slight dyspepsia and nervous symptoms. The doctor found him hypochondriacal and given to trying remedies advised by friends, and to doubling doses prescribed by the doctor when they did not cause the desired effects. A chemist in Liverpool, who saw a portrait of Maybrick in a newspaper about the time of the trial, recognized it as the likeness of a customer who in the spring of 1888, was in the habit of going to the chemist's shop several times a day and there taking doses called "pick-me-ups," to which at the customer's request, the chemist added arsenic. Later, about June, 1888, Mrs. Maybrick told Dr. Hopper that her husband was in the habit of taking some very strong medicine, and always seemed worse after each dose. She wished Dr. Hopper to see him about it, for he was very reticent in the matter. Dr. Hopper searched in Mr. Maybrick's dressing-room for bottles, but did not find anything explanatory. He did not look for a powder. Maybrick told Dr. Hopper that he had habitually taken Fellows' Syrup as a tonic. That contained arsenic, quinine, iron, strychnine, and hypophosphites, but Maybrick never mentioned arsenic specifically as the thing he was taking, and Dr. Hopper never supposed that he was in the habit of using arsenic otherwise. The doctor frequently prescribed strychnine in very minute doses for him, but did not prescribe arsenic. Dr. Hopper had had frequent experiences in his practices in the use of arsenic, principally in Fowler's solution, but had had no personal experience of persons who used arsenic habitually. His information concerning them was from books. In October, 1888, the Maybricks' cook found in their kitchen some fly-papers. No use was made of them, and they remained there until they were destroyed by the servants. In November, 1888, Maybrick consulted Dr. Drysdale, a physician practising in Liverpool. Maybrick told him that he had been complaining for about three months; and the symptoms of

which he complained were pains from side to side of the head and a creeping all over his head, preceded by pains on the right side of the head and a dull headache. He was never free from pain, except in the early morning and possibly in the forenoon. There was no foul taste in his mouth. After smoking much or taking too much wine, he became numb down the left leg and hand, and liable to eruption upon the skin.

Early in March, 1889, Mrs. Maybrick wrote to her husband's brother, Michael, who was a musical composer in London, saying that she ought to tell him that her husband was in the habit of taking a white powder, which she feared might have something to do with pains in his head; and that he was again ill and nervous and irritable; and that when she referred to having seen him take it he flew into a passion, but that he had not the slightest suspicion that she had discovered it, and she would not like him to know it. Michael asked James about it, and James said, "The man who told you this is a damned liar." He consulted Dr. Drysdale again in the following December, and on 7th March, 1889, when most of his symptoms were better. He told the doctor that he had been in the habit of taking nitro-hydrochloric acid, strychnine, hydrate of potash, and several other medicines, but did not mention arsenic. Dr. Drysdale had no special experience or knowledge of arsenic. He found that Maybrick was hypochondriacal. Before the 21st of March, 1889, Mrs. Maybrick also told Dr. Humphreys, a surgeon and general practitioner of Liverpool, who had attended her children, that her husband was taking a white powder which she thought was strychnine, and asked the probable result. Dr. Humphreys replied, "Well, if he should ever die suddenly, call me, and I can say you have had some conversation with me about it."

*Mr. Brierly.* — In that March, 1889, Mrs. Maybrick wrote to a hotel in London, representing that she wished rooms for another Mr. and Mrs. Maybrick. Then she left home representing that she was going to nurse a sick aunt. She went to a hotel in London, and a Mr. Brierly spent two nights in her rooms there.

She returned home on the 28th March, and on the next day she and her husband went to the Grand National races, where Mr. Brierly also appeared. While there she walked with him up the race-course, against her husband's protest. Her husband did not know of their meeting in London, but he quarrelled with her about the man. And she told Dr. Hopper afterwards that, when they reached home that evening, her husband beat her. She



had a black eye. The next day she and a friend, Mrs. Briggs, called upon Dr. Hopper for friendly advice, and Dr. Hopper also saw the husband and wife together. Mrs. Maybrick told him that she could not bear to have her husband near her, and intended to ask for a separation. She also said that she was very much in debt. Dr. Hopper advised her to make a clean breast of it to her husband, who, when told, seemed to make light of the debts, and it was understood that he would pay them.

A woman, whose name was not given at the trial, had been mentioned in connection with Maybrick. Mrs. Maybrick had consulted a friend about her. But as a result of consulting with friends there seemed to be a reconciliation between the husband and wife, and Maybrick went to London to pay Mrs. Maybrick's debts.

*Dr. Fuller.*—While there, on the 14th April, he consulted Dr. Fuller, a member of the Royal College of Surgeons, practising medicine in London, who was the physician of his brother Michael. Dr. Fuller examined him for more than an hour. He told the doctor that he had pains in his head, and had lost some sensation and felt numb and feared being paralyzed. The doctor found nothing the matter with him except symptoms attributable to indigestion, and prescribed an aperient, a tonic, and Plummer's liver pills. Dr. Fuller did not examine him for symptoms of arsenic; but the doctor had had thirty years' experience as a practitioner, and knew the symptoms which accompany the taking of arsenic, but saw no indication that the patient had been in the habit of taking arsenic.

The prescription was put up on 16th April, and no arsenic was known to be in it by the physician or chemists who put it up. Maybrick visited Dr. Fuller again on 20th April, and said that he felt much better. The doctor examined him again, and found that the symptoms of which he complained had partially disappeared, and that he was a nervous man, free from organic disease. The doctor gave him another prescription containing no arsenic. In it compound sulphur lozenges were substituted for pills, and a little sweet spirits of nitre were added. James told the doctor that "a pill," which he said Dr. Fuller had prescribed for his brother, was the only thing he had been taking. But the doctor said that he had not prescribed it. It did not appear what "the pill" contained.

In that April Maybrick said to an acquaintance, "I take poisonous medicines."

*Fly-papers soaking.*—Two or three weeks after the 30th March, the house-maid was in the bedroom with Mrs. Maybrick and saw some fly-papers soaking there. She told the nursery-maid, who went and found a towel covering a basin, and under it another towel covering a plate, and under it some fly-papers soaking. The next morning the house-maid saw traces of fly-papers in the slop-pail. The servants in the house were: the cook, the waiting-maid, the house-maid and the nursery-maid. No one of them ever saw fly-papers used in that house to catch flies.

*Fly-papers bought.*—In that April, not earlier than the 15th, and not later than the 25th, Mrs. Maybrick went to the shop of a chemist named Wokes, in Liverpool, told the chemist that the flies were troublesome in the kitchen, and bought some fly-papers. Her husband had an account at that shop, but she paid cash for the fly-papers. The chemist sent them to her house by his boy. They were rolled up, and after their arrival her husband picked up the roll and looked at it.

*Edwin.*—Another brother of James Maybrick, named Edwin, who had been absent from England, returned to Liverpool on 25th April, and saw James first on 26th April, when James appeared to be in his usual health. On this day a package of medicine arrived from London by post.

*Wirrall Races.*—On the morning of 27th April Maybrick took some medicine. His wife told the nursery-maid that he had taken an overdose of the medicine ordered by the London physician. He went to his office, but looked unwell, and complained of stiffness in his limbs. At noon he rode on horseback to the Wirrall races. One of his friends commented upon his not having a good seat that day. Maybrick replied, "I took a double dose this morning." That friend testified that it rained during the day.

Maybrick told Dr. Humphreys the next day that he dined with a friend that evening, and while there his hands were so unsteady and twitching that he upset some wine, and he was greatly distressed lest his friends should think he was drunk. After coming home that night he was ill.

The next morning, Sunday, 28th April, the cook heard him vomiting. Mrs. Maybrick mixed some mustard and water in a hurry with her finger and asked him to take it, saying, "It will remove the brandy and make you sick again, if nothing else." Mrs. Maybrick said that he had had bad brandy at the races, and that she had given him an emetic. Maybrick said to the waiting-maid that he had an overdose of the medicine from London. The



nursery-maid went for Dr. Humphreys, who called and found Maybrick complaining of his chest and heart. He said his complaint came on that morning, and was the result of a strong cup of tea. The doctor thought that distress and palpitation of the heart was what caused his suffering. The doctor had known strong tea to cause such symptoms. Maybrick told the doctor that his tongue had been furred a long time. He also said that at the races the day before he felt dazed, and his legs felt very stiff. He said that the stiffness was due to *nux vomica* and Dr. Fuller's mixture, and to this Dr. Humphreys assented.

Dr. Humphreys advised him to stop taking Dr. Fuller's prescription containing *nux vomica*, and gave him another prescription. Maybrick said to the doctor, as to his friends thinking him hypochondriacal, "I am not; I know how I feel." The doctor gave him bromide of potassium and tincture of henbane for the stiffness of the legs. Maybrick complained of having had headache for twelve months.

On 28th April Edwin came out to the house and lived there from that time. About one o'clock in the afternoon he found James lying on a sofa apparently ill. James told him that he had been ill on the morning of the day before, but had felt better and went to the races, but had not felt himself the whole day. Dr. Humphreys called twice on this day.

On Monday, 29th April, Dr. Humphreys called again. All the symptoms had disappeared except the furred tongue. The doctor examined him, and concluded that he was a chronic dyspeptic, and prescribed a dietary for him, and promised to call again on the following Wednesday.

*More fly-papers bought.* — On that Monday Mrs. Maybrick went to a chemist named Hanson, about ten minutes' walk from her house, where she bought a lotion, a cosmetic consisting of tincture of benzoine and elder-flowers, and also bought two dozen fly-papers. Her husband had an account there, and she did not then pay for the lotion, but paid cash for the fly-papers, and took them with her. They were not seen in use by any one in the house. The lotion, according to the testimony of Hanson, did not contain arsenic, but was a cosmetic into which arsenic would very likely be put by persons who used arsenic.

*Luncheons.* — On Tuesday, 30th April, the cook prepared some food for Maybrick to take to his office for luncheon. The cook handed it to the waiting-maid, who handed it to Mrs. Maybrick. Mrs. Maybrick said she wanted it wrapped up, and the waiting-

maid went to get some paper and string. When she returned, it had been wrapped up. On this day and the next, Maybrick went to his office. On Wednesday, May 1, Mrs. Maybrick put some farinaceous food into a jug and handed it to Edwin, who took it to James's office. James sent a clerk out, who bought a saucepan, a basin, and a spoon. James poured the food, which was liquid, out of the jug into the pan, put it on the fire, and eat of it. He told Edwin that after luncheon he did not feel so well, and attributed it to what he said was sherry that he did not like in the food. Dr. Humphreys called and found James better after business hours. His tongue was cleaner and his headache had gone. On that evening, Edwin and a friend dined with Mr. and Mrs. Maybrick, and Edwin escorted Mrs. Maybrick to a private domino ball. On Thursday, May 2, the charwoman at James's office saw that the pan and other vessels there had been used, and washed them. On this day Mrs. Maybrick prepared beef tea, which her husband took to the office and warmed, and eat a part of. He felt very ill after luncheon. Edwin only knew of his having food at the office Wednesday and Thursday. The cook testified that she prepared food for James to take to the office on four days of this week, and on one of these days he forgot it.

*Illness.*— On Friday morning, 3d May, Maybrick sent for Dr. Humphreys, and told him that the medicine did not agree with him. Mrs. Maybrick replied that he always said that. Dr. Humphreys told him that he could not see that anything was the matter, and advised him to go on with the medicine. Mrs. Maybrick told the nursery-maid that Dr. Humphreys said it was only his liver that was out of order. Mrs. Maybrick added: "But all doctors are fools, and they say that because it covers a multitude of sins."

Mrs. Maybrick brought the children in to see their father. On this morning the charwoman at the office saw that the pan and other vessels there had been used again and cleaned them again. This was the last day on which Maybrick went to his office. In the evening Maybrick took a Turkish bath, and, after returning home, was sick twice. At midnight Dr. Humphreys was called to him again, and found him with great pain in the thighs from the hip to the knee, particularly in the "back aspect of the joint." They had rubbed his legs with turpentine. He complained of gnawing pain. Dr. Humphreys thought that it might have been caused by excessive towelling and rubbing in the Turkish bath that evening. Maybrick said that he was sick twice when he reached home



that day, and that he thought it due to inferior sherry in Du Barry's food. Dr. Humphreys gave him morphine suppository. The next morning early, Saturday, 4th May, Dr. Humphreys called and saw Maybrick still in bed. The pain had gone, but he was sick and vomiting, and could retain nothing. Maybrick complained of it as the result of the morphia, and Dr. Humphreys thought the same. Dr. Humphreys found him slightly feverish. Temperature, 99.4. After that day it was normal. Average, 98.4. The doctor told Maybrick to suck ice or a damp cloth, but to take nothing else. On this day the cook took some medicine which arrived up to the bedroom. Mrs. Maybrick complained to her for doing this, and gave orders that nothing should go to him except through herself. She said to the cook about his medicine: "If he had taken that much more"—measuring on her finger—"he would have been a dead man."

Mrs. Maybrick threw what she called "that horrid medicine" from London down the sink. On Sunday, 5th May, the cook wanted to look after him, but Mrs. Maybrick said that he would not recognize the cook. He told Edwin that he had been very sick and could not retain any food in his stomach, either liquid or solid. At 5 P. M. Edwin, who had not seen Maybrick since Thursday, called and found him ill in bed, and gave him some brandy and soda. He vomited it in half an hour. He was very sick all that afternoon. Dr. Humphreys came and found him hawking more than vomiting, and forbade both eating and drinking, and ordered a wet towel when he was thirsty. Maybrick never left his bed after this day.

In Edwin's words, "he was very sick and pretty much the same from that day." Mrs. Maybrick sat up at night with him for most of the nights. Dr. Humphreys changed the medicine on this day because the expected improvement did not come. Dr. Humphreys advised using Valentine's beef essence. On Monday morning, 6th May, Dr. Humphreys called and asked Mrs. Maybrick whether she would not like to have another doctor. She said no; he had had so many. Dr. Humphreys prescribed a blister on the stomach for the vomiting. The doctor ordered them to stop the Valentine beef essence, because it made many people sick. The doctor also stopped the medicine and gave Fowler's solution, containing a little arsenic, either on this day or the day before. Maybrick took three doses of it. Maybrick asked his wife to let him have some lemonade. She said that he could only have it as a gargle. Mrs. Maybrick went out shopping on this day. The nurse rubbed May-

brick's hands for numbness, and wanted Mrs. Maybrick to send for Dr. Hopper, but Mrs. Maybrick replied that her husband would not take what Dr. Hopper prescribed. One of the servants asked Maybrick whether she could do anything for him. He replied, "No, thank you; Mrs. Maybrick will attend to all my wants." On Tuesday, 7th May, in the afternoon, Dr. Carter also came as well as Dr. Humphreys. Mrs. Maybrick told Dr. Humphreys that she had not sent for Dr. Carter, but that Edwin had. Maybrick told Dr. Humphreys that he felt better after the blister. Dr. Humphreys thought of the patient's condition "favorably." Dr. Humphreys thought he had congestion of the stomach. He was not complaining of any pain, and there was no redness of the eyes or eyelids. Diarrhœa was just appearing; he was weak and vomiting, and had pain in his bowels. Maybrick complained to Dr. Carter of having suffered from vomiting and diarrhœa for several days past.

Dr. Carter thought he had dyspepsia, and Mrs. Maybrick suggested that his condition was a result of his eating and drinking in his bachelorhood. She suggested calling in a physician who attended a friend of Edwin's. Dr. Carter on this day did not suspect poison. Dr. Humphreys testified that he could retain a pretty good "quantity of fluid food without being sick, but still complained of a tickling in his throat." After consultation the two doctors prescribed tincture of jaborandi for saliva, antipyrine for restlessness, and a wash of chlorine water for the mouth. Dr. Humphreys thought he would recover. On this day the nursery-maid saw Mrs. Maybrick on the landing of the stairs, near the bedroom, pouring from one medicine-bottle into another.

On Wednesday, 8th May, Mrs. Maybrick spoke to Edwin about getting a nurse. The cook thought that Mrs. Maybrick seemed to be very kind to her husband, and to spend all her time with him. He wanted his hands rubbed, and Mrs. Maybrick said: "You are always wanting your hands rubbed. It does you no good." Mrs. Briggs called to-day and went upstairs to ask Mr. Maybrick about himself. Mrs. Maybrick interrupted her, and said that if she would go downstairs she would tell her what was the matter with him. Mrs. Briggs went downstairs, but she could not remember whether Mrs. Maybrick told her anything about him or not. Mrs. Briggs suggested calling in a nurse. Mrs. Maybrick said that there was no occasion for a nurse, as she would nurse him herself, and that that was also the doctor's opinion. Mrs. Briggs thought the patient to be in serious peril. Finally Mrs. Maybrick fell in with



Mrs. Briggs' suggestion and let Mrs. Briggs telephone for a trained nurse. Mrs. Briggs also telegraphed to Michael. Edwin, too, telegraphed to Michael, who came that day from London to Liverpool. Mrs. Briggs and Edwin consulted together, and consequently he engaged a professional nurse named Gore, who arrived ready for duty at about 2:30 P.M. that day.

*Suspicion.* — At about 3 P. M. Mrs. Maybrick gave a letter to the nursery-maid to go by the 3.45 post.

The nursery-maid took the letter and went out with it, taking the younger child with her. In her testimony, she said that she gave it to the child to post, and the child was carrying the letter and dropped it in the mud, and therefore the nursery-maid opened the envelope to put it into a clean envelope, and noticed suspicious words in it, which led her to take it to Edwin instead of posting it. She gave it to Edwin that afternoon.

The letter was to Mr. Brierly, as follows: —

“Wednesday.

“DEAREST, — Your letter under cover to John K. came to hand just after I had written to you on Monday. I did not expect to hear from you so soon, and had delayed in giving him the necessary instructions. Since my return I have been nursing M. day and night. He is sick unto death. The doctors held a consultation yesterday, and now all depends upon how long his strength will hold out. Both my brothers-in-law are here, and we are terribly anxious. I cannot answer your letter fully to-day, my darling, but relieve your mind of all fear of discovery now and in the future. M. has been delirious since Sunday, and I know now that he is perfectly ignorant of everything, even of the name of the street, and also that he has not been making any inquiries whatever. The tale he told me was a pure fabrication, and only intended to frighten the truth out of me. In fact he believes my statement, although he will not admit it. You need not therefore go abroad on that account, dearest; but, in any case, please don't leave England until I have seen you once again. You must feel that those two letters of mine were written under circumstances which must even excuse their injustice in your eyes. Do you suppose that I could act as I am doing if I really felt and meant what I inferred then? If you wish to write to me about anything, do so now, as all the letters pass through my hands at present. Excuse this scrawl, my own darling, but I dare not leave the room for a moment, and I do not know when I shall be able to write to you again. — In haste, yours ever,  
FLORIE.”

Dr. Humphreys had called that day. The patient seemed to him better, but had had a rather restless night. He had not been

delirious. Dr. Humphreys did not say that it all depended on "how long he would hold out," or that he was "sick unto death," or that he had been "delirious."

Mrs. Maybrick asked Dr. Humphreys to telegraph to a nurse who had attended her in confinement, and he did so.

Michael arrived, and Edwin told him about the letter. Michael went to the house with Edwin. Michael, on cross-examination, was asked whether he found the patient in a "semi-conscious condition." He replied, "A sort of semi-conscious condition." Michael had an interview with Mrs. Maybrick. He told Mrs. Maybrick that he had very strong suspicions of the case. She asked what he meant. He complained because she had not sent before for another doctor and a nurse. She replied that no one had a better right than a wife to nurse her husband. To this he agreed, but reiterated that he was not satisfied, and would go and see Dr. Humphreys, which he did. Edwin ordered the nurse, Gore, not to permit any one but herself to give any medicine or food to Maybrick, but he did not tell Mrs. Maybrick of these orders.

About 6.30 P. M. Mrs. Maybrick put some medicine into a glass. Nurse Gore poured it into the sink. Dr. Humphreys and Dr. Carter both called that day. Michael and Edwin slept there that night.

On Thursday, 9th May, Mrs. Maybrick said to the nursery-maid, "Do you know I am blamed for this?" "For what?" "For Mr. Maybrick's illness, for not sending for another doctor and nurse." Mrs. Maybrick also cried, and told the cook that her position in the house was not worth anything, and that Michael had a spite against her ever since her marriage, and that she was turned out of the bedroom and not allowed to give medicine to her husband. At about 11 A. M., a new nurse, Callery, came to relieve the nurse Gore. Dr. Carter called in the afternoon and found that the patient was suffering from violent *tenesmus*. His bowels were quite loose. The appearance of *tenesmus* was unusual.

Dr. Humphreys said he had diarrhœa and straining at about 8.30 A. M., and complained of great pain, and that this was the first time when the looseness of the bowels was seriously excessive. Before that, there was disturbance of the bowels, but not purging or diarrhœa.

Dr. Carter analyzed Neave's food and brandy, and found nothing wrong in them.

Michael came into the room about 2 P. M. and found Mrs. May-



brick pouring medicine from one bottle into another without concealment. He said, "Florie, how dare you tamper with the medicine?" He took it away and gave it to Dr. Humphreys. She said it was because of sediment. She was putting a label on the bottle. Nurse Callery was in the room. That was analyzed, and no arsenic was found. On this day Dr. Humphreys heard for the first time of the letter which the nursery-maid had opened the day before. He examined some of the patient's fæces and urine by Reinsch's test, but found no arsenic. He did not pretend to be skilful in this.

He thought then that the patient was suffering from acute congestion of the stomach; and if no suggestion of poison had been made to him, and the patient had died then, he would have given a certificate of death from gastritis, inflammation of the stomach, or gastro-enteritis, inflammation of the stomach and bowels. He testified that "Mrs. Maybrick did everything which I requested her to do."

*Arsenic in the meat-juice.* — Thursday night, nurse Gore opened a fresh bottle of Valentine's meat-essence, put a little of it into some water, tasted the mixture, and gave some to the patient, who was not taken sick after it. The same nurse soon afterwards saw Mrs. Maybrick take that bottle of meat-essence from the table in the bedroom with her left hand and cover it with her right hand, and carry it into the adjoining room. She pulled the door almost to after her. In about a couple of minutes she returned, her hand being by her side, covering the bottle, and told the nurse to go and get some ice. The nurse replied that the patient was asleep, and stayed on watch. Mrs. Maybrick, while speaking to the nurse, was seen by the nurse to raise the hand containing the bottle and to put the bottle on the table. When he waked up, the nurse saw Mrs. Maybrick take that bottle of meat-juice from the table and put it on to the washstand. The nurses watched that bottle until one of them gave it to Michael Maybrick. He gave it to Dr. Carter, who analyzed it and found arsenic in it. Mr. Davies, the analytical chemist described below, afterwards found half a grain of arsenic in this bottle. Valentine's meat-juice is not made with arsenic.

On Friday, 10th May, nurse Callery had a glass with medicine in her hand, and Mrs. Maybrick was trying to persuade her husband to take it. He replied, "You have given me the wrong medicine again." Mrs. Maybrick said, "What are you talking about? You never had wrong medicine." Nurse Callery testified that Mrs.

Maybrick used to sit sometimes on the bed, and sometimes beside him, and that Mr. and Mrs. Maybrick "spoke a great deal in a low tone," and that he was "very weak and his voice was not strong." Michael testified that the patient seemed to him to have improved until this morning. On this day Dr. Carter found the patient with diarrhœa, but it was not so intense. The *tenesmus* was better. His mind was quite clear. Dr. Carter testified that on Friday, Thursday, and Tuesday his mind was always clear; that he was never in the slightest degree delirious. He gave him suppositories because he could not take food by the throat. That night he was delirious. He could not retain the suppositories. Dr. Carter testified that it was then too late to do anything for protection, and that he had said, if the matter turned out to be so bad as he feared, it would be taken out of the doctors' hands entirely. On this afternoon Dr. Humphreys thought that he had reason to suppose there were grounds for the suggestion of poison. Nurse Wilson, who had relieved nurse Gore, heard Maybrick say, "O Bunny, Bunny! how could you do it? I did not think it of you." Mrs. Maybrick answered, "You silly old darling, don't trouble your head about things." "Bunny" was his pet name for his wife. At about six o'clock this evening the patient was delirious. At half past ten he was very ill, and Dr. Humphreys told Michael his condition, so that a solicitor might be seen as to his affairs. Mrs. Maybrick said there was no hope.

On Saturday, 11th May, at 3 A. M., the patient was very ill indeed, and became gradually worse. About noon Dr. Carter called and found the patient dying. He could take no nourishment. At half past eight that evening James Maybrick died.

*Search.* — So soon as he was found to be dead, Michael, without the knowledge of Mrs. Maybrick, ordered the nursery-maid and the house-maid to look for what they could find. The nursery-maid brought him, from a trunk of Mrs. Maybrick, a chocolate-box. In the chocolate-box there was a small parcel, labelled "Arsenic — Poison for cats." It was admitted by defence to be arsenic mixed with charcoal.

On the next day, Sunday, 12th May, Michael, Edwin, Mrs. Briggs, and Mrs. Hughes, her sister, made further search. In the dressing-room was found a small bottle and a handkerchief; also a small blue box in a hat-box in that room, three bottles in the smaller box, on top of the box a bottle of Valentine's meat-extract. In a second hat-box there was a tumbler containing milk and a rag. Arsenic was found in some of these things, and in other things,



as appears below in the account of the results of Mr. Davies' chemical examination. Nothing was found locked except Mrs. Maybrick's wardrobe, and nothing was found in the wardrobe connected with this case. There were a good many medicine bottles in the house, and also at Maybrick's office.

On Monday, 13th May, a post-mortem examination<sup>1</sup> was made by Dr. Humphreys, Dr. Carter, and Dr. Alexander Barron, who attended on behalf of Mrs. Maybrick, and was a professor of pathology at University College, a practising physician in Liverpool, and a member of the Royal College of Surgeons, pathologist to the Royal Infirmary, and had attended about five hundred post-mortem examinations. Superintendent Bryning, of the police, was present.

*In Custody.* — On 14th May a policeman was in charge of Mrs. Maybrick at her house. Mrs. Maybrick and Mrs. Briggs and

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<sup>1</sup> Dr. Humphreys' description of the body was as follows: "The frame and condition of the man were well developed, his countenance being classical. The pupils of the eyes were mediumly and equally dilated. There was a discharge from the lower bowel, and, when turned over, a slight discharge of fluid from the mouth. The discharges were chemically tested. The witness then described the post-mortem appearances resulting upon examination, and said that when they opened the chest the first rib on each side was found to be slightly ossified. The lung was found in the left chest to be adherent; it was fixed by an old adhesion, and that meant the evidence of pleurisy. The right lung was free from adhesion, but it contained some fluid. The lung was taken out, and was found to be normal. When the sac of the heart was cut into, fluid was found; and the heart itself was found to be covered with fat. Upon cutting into the heart itself, it was found that the right ventricle contained a little clot, but the left side of the heart was empty and in a normal state. The valves of the heart were natural, and the condition of the windpipe was normal. Upon taking the tongue and the larynx out, and the œsophagus and the gullet, they found that the tongue was black and the gullet at the top of the throat was slightly red. Below that for some distance the appearances were quite natural; but lower down again, before getting to the stomach, the lower part of the mucous membrane, there was a gelatinous appearance, which had the appearance of frog's spawn of a yellowish color, with black patches. In the larynx, at the posterior of the epiglottis, they found that there was a little ulcer, about the size of a pin-head. It was red and very shallow, and that also the free margin of the epiglottis was eroded, or rotten. Upon the posterior aspect of the cartilage, which goes to form the voice-box, they found two little red patches. The stomach was tied at each end and taken out, and they found that it contained some fluid, — some five or six ounces of a brownish fluid. When opened and poured out, they found each end of the stomach was red, and here and there there was small ecchymosis, or blood-clot, infused under the lining of the stomach. Getting out of the stomach into the duodenum, they found there about three inches of red inflammation, and this appearance continued down for about three feet in the intestines. About eighteen feet lower down in the intestines they found another area of red inflammation, and it corresponded with the blue patch he referred to first, with the vessels running over it. The very extremity of the bowels — the rectum — was also slightly red. The liver seemed natural, and the kidneys were natural. The spleen weighed five or six ounces, and was of a kind of mahogany colour. The brain was natural."

her sister and nurse Wilson were together. Mrs. Briggs told Mrs. Maybrick that arsenic had been found in the Valentine meat-juice. Mrs. Briggs' sister said to Mrs. Briggs, "You are not to say anything," and the policeman at the door of the room said, "You are not to speak." The room was not large, and the door was partly open, so that the conversation could be heard where the policeman was. Neither Mrs. Briggs nor Mrs. Hughes remembered any attempt by Mrs. Maybrick to reply.

Mrs. Briggs suggested to her to write to Mr. Brierly for assistance, which she did, saying in her letter that she was in custody without money, and adding: —

"The truth is known about my visit to London. Your last letter is in the hands of the police. Appearances may be against me, but before God I swear I am innocent."

Mrs. Briggs handed the letter to the policeman, but it was never delivered.

A week or two after the death, when the furniture was being removed from the house, Edwin found in the drawer of the wash-stand, in the bedroom of the deceased, a pill-box labelled "Taylor Brothers, Pharmaceutical Chemists, Norfolk, Virginia," and with the description, "Iron, quinine, and arsenic, one capsule every three or four hours; to be taken after food," and the address, "Mr. Maybrick." James Maybrick had not been in Norfolk since 1884.

*Chemical Analysis.* — The bottles and other things, including some of the organs of the deceased, were examined by Mr. Edward Davies, analytical and consulting chemist, of Liverpool, Fellow of the Pharmaceutical Society and of the Institute of Chemists of London, who had been an analyst for thirty-six years, and who was a witness for the prosecution. He found arsenic in the intestines; he did not determine the amount, and thought it too small; arsenic in the liver distinctly; he found two hundredths of a grain in six ounces of liver; and estimated that the liver probably contained about one eighth of a grain; also arsenic in the kidneys, estimated at about one hundredth of a grain. He found the arsenic already mentioned in the bottle of meat-juice; also twelve or fifteen grains of arsenic in a bottle from a box from the dressing-room, also in a bottle from the same box a saturated solution of arsenic, with small portions of solid arsenic at the bottom in water; also, in a bottle from the same box, several grains of solid arsenic and a small quantity of fluid; also a large quantity of



arsenic in the tumbler of milk, with a handkerchief in it, thoroughly soaked with it; also in the chocolate-box. The larger part of the powder marked "Poison for cats" was arsenic; the rest was charcoal.

Mr. Davies also examined the pan, basin, and jug used by Maybrick to warm his luncheon at his office. They appeared clean, but under the ledge of the jug were two little drops of dried skim, rather less than a quarter of an inch long, such as might have come from gruel. He poured boiling water into all of them, and tested the "washings" by "Reinsch's test," and found very marked and distinct crystals of arsenic. The acid "with which the test was made was not added into the pan, the jug, or the basin." Then he bought a new pan and boiled distilled water in it, and tested it by the same test, but found no arsenic. He also examined a bottle labelled "Mixture, a sixth part to be taken early every morning. James Maybrick, 24th April," from Clay & Abraham, the chemists, and found "a distinct evidence of arsenic in it, more than a trace." The clerks at Clay & Abraham's, who put up Maybrick's medicine, testified that it contained no arsenic. He also found arsenic in a blue bottle containing nitro-glycerine. He procured similar glycerine and found no arsenic in it. A dressing-gown of Mrs. Maybrick's which had been taken by one of the nurses after Maybrick's death and had been subsequently delivered to the police, was examined by Mr. Davies. Neither the material nor dye of the dressing-gown contained arsenic, but he found distinct traces of arsenic in its pocket, and there was a handkerchief in its pocket in which he found two one hundredths of a grain of arsenic.

He also found a trace of arsenic in the front of an apron, below the waistband. He examined samples of fly-papers from Hanson's and from Wokes'. One of Hanson's contained two and one quarter grains of arsenic. He "took two halves of two different papers and found 2.95 grains of arsenic." "The other two halves he soaked in water for an hour, and then poured it off without squeezing or anything." He found three quarters of a grain of arsenic had dissolved in that time from one paper. Many other bottles and various things from the house and the office were examined by him without finding arsenic.

On the cross-examination of Mr. Davies, Sir Charles Russell asked, with reference to Mr. Davies' testimony that he found arsenic in some of the organs of the body, "In this case you only found half the arsenic you have found in any other case which

ended fatally?" Mr. Davies answered, "Yes; it was one half of what I found in the case of Margaret Jennings, and that was half of the smallest amount I have ever known."

*Medical Opinions.* — Dr. Fuller was a witness for the prosecution, and testified that the effect of doses of arsenic varies with the person; that from his reading he had learned that the habit of taking arsenic does not grow, but that he could not say one way or the other from his own experience. He had had one patient who took it for several months, and then left it off without feeling any depression. Dr. Fuller accounted for this by the smallness of the doses.

The physicians who testified on either side agreed in general that the chief symptoms in life of acute poisoning caused by arsenic are excessive vomiting and retching, diarrhoea, and *tenesmus*, abdominal pain, and redness of the eyes and eyelids, and that these symptoms are not always regular in their relative proportions or intensity, but are somewhat anomalous.

Most of the physicians for the prosecution thought that the symptoms before death, the inflammation found after death, and the arsenic found in the body, proved death by arsenical poisoning. The physicians for the defence, taking the testimony of the physicians for the prosecution and the other evidence as their subject, were of opinion that such testimony did not prove either that the symptoms before death or the appearances after death were due to arsenical poisoning, and some of them thought the symptoms and appearances were not consistent with arsenical poisoning. The physicians for the defence did not attribute so much importance to the arsenic found in the body after death as the physicians for the prosecution.

Dr. Stevenson, who was physician at Guy's Hospital, London, and lecturer there on forensic medicine and chemistry, a toxicologist of a very large experience for many years, examined some of the organs of Maybrick after the post mortem, and was present officially as a witness for the prosecution because he was an analyst, nominated by the Home Office and by the College of Physicians, and his services could be required. He testified that "there is no distinctive diagnostic symptom of arsenical poisoning; the diagnostic thing is finding the arsenic;" and, in his opinion, "the body at the time of death probably contained a fatal dose of arsenic. I have found a little more or a little less than I did find here in undoubtedly fatal cases of arsenical poisoning."

On the other side, Mr. Tidy, a bachelor of medicine and master



of surgery, and an examiner of forensic medicine at the London Hospital, who was formerly one of the assistant pathologists at the London Hospital, and had assisted at a very large number of post-mortem examinations, and who was an analyst employed by the Home Office, having had a very large experience for more than twenty years in cases of poisoning, had not seen the patient or any organs, but heard the testimony at the trial, and was a witness for the defence, and testified that the presence of arsenic in the body of one who has undoubtedly died of some irritant poison did not lead him to suppose that it was arsenic. In his opinion, the symptoms before death, as testified to by others, were not sufficient to prove arsenical poisoning, and "the symptoms of the post mortem distinctly point away from arsenic."

Dr. Humphreys and Dr. Carter, who attended Maybrick in his last illness and were present at the post mortem, were witnesses for the prosecution, and testified that in their opinion his death was caused by his being poisoned by arsenic.

Dr. Humphreys testified that at the post mortem he saw in the stomach some "small spots of brilliant arborescent vascularity," but on cross-examination he admitted that they were of "a line-like character." They were suggested by the prosecution to be what are known as petechiæ, which are marks of arsenical poisoning. But Dr. Carter's notes of the post mortem did not contain any reference to such appearances, or to a petechious condition of the stomach, and Dr. Barron testified that his notes did not mention such spots. He said: "There may have been one or two but they must have been doubtful, or we should have made some mention of them on our notes." Dr. Humphreys stated on cross-examination that he never before had attended any one who had been poisoned by arsenic, and that he could not say whether the irritation in Maybrick's stomach was from dyspepsia or poison.

Dr. Carter's experience included cases of overdosing medicinally with arsenic, but not death. He had judged that a fatal dose of arsenic had been given to Maybrick on Friday, 3d May, but he thought also there must have been subsequent doses. He knew of a case where two grains of arsenic given in five successive doses of two fifths of a grain in Fowler's solution killed a woman after the fifth dose. In such cases the successive doses must be given before recovery from the preceding. Dr. Stevenson testified that "when a dose less than a fatal dose is given, the symptoms are much the same, but more spread out. They may subside, and then after another dose recur and again subside, and so on."

Dr. Barron did not attend Maybrick in his lifetime, but examined his body at the post mortem, and was a witness for the prosecution. He testified: "I came to the conclusion that death was due to acute inflammation of the stomach, probably caused by some irritant poison."

Sir Charles Russell, in cross-examining Dr. Barron, brought out the fact that inflammation of the stomach and bowels is sometimes caused by impure food, such as sausages; but in the re-direct examination by Mr. Addison, Dr. Barron testified that he did not remember any death from poisoned meat.

Sir Charles Russell, in cross-examining Dr. Stevenson, dwelt upon the fact that gastro-enteritis may be set up by bad meat, and that the symptoms in both cases might be substantially similar.

Dr. Stevenson said upon that point:—

"Well, the symptoms produced by irritant food as a rule do not come on so very quickly after taking it as after arsenic. Then there is the fact that in the vast majority of cases several people partake of a common food, and they suffer from like effects. . . . I mean they would all have the same symptoms."

Dr. Stevenson said, as to the analysis by Dr. Davies and the analysis by himself:—

"Coupling my analysis with what I have heard in this court, I can have no doubt as to the cause of death being from an irritant poison, and from the irritant poison found."

Dr. Stevenson expressed the opinion that, in looking for the cause of the first illness, he found that it is accounted for by the testimony as to the occurrences of Friday, 3d May. Then Sir Charles Russell asked him the following question:—

"After hearing the history of the case and the result of the post-mortem examination, would you maintain the same attitude of mind and withhold any pronounced opinion until you had heard the result of the analysis?"

Dr. Stevenson replied:—

"I should have had a pronounced opinion that the deceased had died from an irritant poison, and I should have had the strongest suspicion that it was arsenic, but I should have been cautious in saying that it was arsenic until it was proved to me in the analysis."

Sir Charles Russell asked:—

"You withheld your opinion as to the cause of death until you heard the result of the analysis?"



Dr. Stevenson replied: —

“Yes, and quite properly.”

Mr. Tidy, in testifying for the defence, said, concerning the symptom of the spots called *petechiæ*: —

“Although it varies, to my mind it is the most distinctive characteristic of post-mortem appearances in cases of arsenical poisoning.”

And when on cross-examination, Mr. Addison called his attention to Dr. Humphreys’ testimony, Mr. Tidy replied: —

“Well, he said he saw something of the kind, I believe. But I think afterwards he said that they were a brilliant arborescent appearance, which would be the result of something else, and not *petechiæ*. The *petechiæ* of arsenical poisoning have a linear dotted appearance and not arborescent.”

Mr. Tidy criticised the testimony of Dr. Stevenson, who had estimated the probable amount of arsenic in the liver by multiplying the small amount which he found in a part of the liver by the proportional figure required to represent the whole liver. Mr. Tidy said that it was unwarrantable to assume an equal distribution of arsenic through the parts where arsenic was found. On cross-examination, Mr. Tidy admitted that the symptoms during life were symptoms of an irritant of some kind, and that possibly that irritant, whatever it was, was a poison which killed him; but when asked, “Can you suggest what it was?” he replied, “No, I cannot.” He afterwards stated that he was not a practising physician.

Another witness for the defence was Dr. Rawdon Macnamara, a Fellow of the Royal College of Surgeons of Ireland, having been its president, and being its representative on the General Medical Council of the Kingdom. He was also a Doctor of Medicine of the University of London, and the author of a standard work on the action of medicine, which has passed through many editions; also Professor of *Materia Medica* at the Royal College, and for many years senior surgeon at the Lock Hospital, Dublin, and Surgeon at the Meath Hospital. In his experience he had had to administer arsenic in a very large number of cases. With reference to Dr. Humphreys’ testimony that the blister seemed to relieve the patient for a time, he said that it would not stop the vomiting attendant upon arsenical poisoning, but it would be very judicious in the case of gastro-enteritis, and would stop the vomiting caused by that. In this case he had not seen the patient or

any of his organs, but he had heard the evidence, and was of the opinion that Maybrick died of gastro-enteritis, not connected with arsenical poisoning. Upon cross-examination he went so far as to say: "I can perfectly believe that a wetting coupled with neglect of precautions and a weak stomach and circulation, may produce these consequences."

The next witness for the defence was Frank Thomas Paul, F. R. C. S., Professor of Medical Jurisprudence at University College, Liverpool, and Examiner in Forensic Medicine and Toxicology to the Victoria University. He had not been engaged in an arsenical case before this, and had not examined professionally patients suffering from excessive doses of arsenic. He testified that he had taken four pans like that one in Maybrick's office, and, in order to test the glazing of the pans, had added hydrochloric acid to some boiling water in the pans, and then, by Reinsch's test, found arsenic there. He admitted, on cross-examination, that this experiment with acid was not like the ordinary use which Mr. Davies made of boiling water. He went so far as to name the least number of grains of arsenic which, in his judgment, would be required as a fatal dose to a man like Maybrick, and said, "Certainly not less than three grains," and that the amount of arsenic found in the parts of Maybrick which were analyzed was consistent with the case of a man who has been taking it medicinally, and who had left it off for several months.

Mr. Jones, a chemist, testified that there was an impression in the trade that arsenic was used as a cosmetic, but he did not know from his own experience. Mr. Biolitti, a hair-dresser, testified that arsenic is used in toilet preparations. On cross-examination, he said that it was used to remove hair, and was not as a rule used as a cosmetic.

*Prisoner's Statement.* — After all the evidence was in, Mrs. Maybrick, by permission of the court, and without being sworn, made a statement to the jury, no questions being asked her by any one. She said substantially: —

As to the fly-papers, that she soaked them to get arsenic to mix with other ingredients for a cosmetic, and applied the solution to her face with a handkerchief; and, as to the bottle of meat-essence, that on Thursday night, 9th May, her husband "implored" her to give him "this powder;" that he told her the powder would not harm him, and that she could put it in his food; and that she found the powder and took it into the inner-room with the beef-juice, and in pushing through the door upset the bottle, and, to make up for the fluid spilled, added



some water, and on returning found her husband asleep and put the bottle on the table, and when he waked up, and did not ask for the powder again, she removed it from the table, where it would attract his attention, to the wash-stand where he would not see it, since she was "not anxious to give it to him;" and that she left it there until Michael took possession of it; and that she did not know, until the Tuesday after the Saturday when her husband died, that there was any reason to suppose that her husband had died from any other than natural causes; and she said: "It was only when Mrs. Briggs alluded to the presence of arsenic in the meat-juice that I was made aware of the nature of the powder my husband had asked me to give him. I then attempted to make an explanation to Mrs. Briggs, such as I am stating to your Lordship, when a policeman interrupted the conversation and put a stop to it. I have only to add that for the love of our children, and for the sake of their future a perfect reconciliation had taken place between us, and that on the day before his death I made a full and free confession to him, and received his entire forgiveness for the fearful wrong I had done him."

After the arguments and the judge's "summing up," the jury retired, and in about thirty-five minutes returned with their verdict of guilty. The prisoner replied:—

"Although I have been found guilty, with the exception of my intimacy with Mr. Brierly I am not guilty of this crime."

The judge at once sentenced the prisoner to be hanged.

*Commutation.*—Soon the Home Secretary, upon request, made inquiries, and the punishment was commuted to penal servitude for life, the following reason being given:—

"Although the evidence leads clearly to the conclusion that the prisoner administered and attempted to administer arsenic to her husband with intent to murder, yet it does not wholly exclude a reasonable doubt whether his death was in fact caused by the administration of arsenic. . . . The course adopted has the concurrence of the learned judge."<sup>1</sup>

The conflict of expert opinion of course raises doubts, which appear reasonable to many physicians, lawyers, and others who are not bound to the jury's duty. But the jury was not made up of scientific or professional men, and its task was, after considering the medical testimony and all the other evidence, to decide by common sense.<sup>2</sup> No witness, of whatever distinction in science,

<sup>1</sup> Levy, p. 441, citing the Times.

<sup>2</sup> Ballantine (Experiences, vol. 1, p. 197), commends "the strong good sense of Lord Campbell" in not permitting Palmer's case to drift into "chemical refinements." Summing up reported in Trial (London, Henry Lea); in Public Library, Boston, Mass.

can relieve the jury of its function of judging the facts. And no difference of opinion between experts makes it necessary for the jury to doubt its own opinion upon the evidence in order to be as reasonable as the law requires. The jury are not bound to give any more credit to the opinion of any expert than it seems to them, under all the circumstances, to deserve. The object of permitting expert witnesses to express their opinions is not to prevent the exercise of judgment. It is to inform the jury by scientific knowledge, and by helping them to observe how the minds of experts work upon certain facts. And while the jury is being thus instructed, some of its members occasionally discover in learned witnesses an apparent lack of judgment. Such a discovery properly affects the weight to be given even to the opinion of an eminent man of science.

The jury's responsibility of forming an opinion is as great as its duty of testing any opinion which it may form. And the natural and usual method in jury work, as in life elsewhere, is to begin by impressions that the weight of evidence leans this way or that. After such an impression comes opinion, and then the man of average reasonableness considers whether his opinion is open to reasonable doubt or not. It is not the function of expert witnesses to prevent such healthy action of the mind. A jury may be as reasonable as it can be when it decides contrary to expert opinion, because it finds itself actually without any doubt which seems to it to be reasonable. The law gives to the jury the privilege of its ignorance. Nor are jurymen to fear to exercise such privilege. They are merely to do as well as they can in thinking for themselves in the light of all the evidence. It is not absurd for a jury to think that a learned man may be mistaken. And in this case the verdict was supported by the opinions of the attendant physicians, and of distinguished experts who had examined the body or some of its organs. The chief experts for the defence had neither attended the patient before nor seen his body after death. They testified chiefly as critics of the reports of the other physicians.

The physicians for the prosecution apparently accepted the facts as a new combination of facts that surprised but convinced them that it was a peculiar instance of arsenical poisoning. The physicians for the defence were not convinced that the facts as reported proved arsenical poisoning, and set such knowledge as they had already against what the others seemed to treat as new knowledge. When Mr. Tidy went so far as to say that "the symp-



toms of the post mortem distinctly point away from arsenic," it could hardly be expected that a jury would regard such a remark as being made with judgment equal to that of Dr. Stevenson when he said that "the diagnostic thing is finding the arsenic."

Since arsenic was found in the parts mentioned, and no impure food or other poison was said to have been found there which could have caused the inflammation, it would have been peculiar if the jury had not believed that the arsenic caused it. The fact that the arsenic found was not then sufficient in quantity for a fatal dose was not so important a fact as the presence of some arsenic, because the medical testimony showed that some would pass off.

The influence of the opinion of the physicians for the defence was affected by their own admission that symptoms of arsenic poisoning are anomalous. And when a man of Dr. Stevenson's experience and method of testifying was of the opinion in 1889 that, notwithstanding the peculiarities and irregularities of the symptoms of the patient in this case, his death added one more to the deaths from arsenic occurring after anomalous symptoms, the jury had reason to think that there was in this case something which the medical gentlemen on the other side failed to learn. Physicians with new learning will of course bear in mind the date.

In judging the circumstances outside of medical opinion, the jurymen were on more familiar ground. The verdict is based upon what Lord Campbell called "a combination" of medical and circumstantial evidence.<sup>1</sup> Probably the jury disbelieved the whole of the prisoner's statement. And such disbelief would naturally affect their finding upon other issues involving a question of her veracity. Probably it would have been hard for the jury to doubt that the prisoner had put arsenic into her husband's food, and caused him to take it, before she was discovered in the act of tampering with the meat-juice. The other circumstances, with that, would incline an average jury to an opinion which only needed corroboration by the medical witnesses for the prosecution as to the symptoms, to free it from what they might regard as reasonable doubt. Upon such evidence, it was evidently easy for them to think the experts for the defence to be mistaken, and of a doctrinaire tendency. Making much of Maybrick's taking arsenic as a medicine and a stimulant did not weaken the proofs of his family history during the spring before his death. It was not proved that he took arsenic

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<sup>1</sup> The said report of Palmer's trial, p. 180.

often, or in any large quantity, for eighteen months before his last illness.

The prosecution massed the facts of the two months preceding the death as connected and explaining each other. The defence tried to disconnect them. By dividing the history of the case, and committing the attendant physician to saying that if Maybrick had died several days earlier he would have given a certificate of death, the defence tried to reduce the probability that symptoms of arsenical poisoning preceded the 8th May, when the letter to Brierly led Maybrick's friends to suspect his wife of a motive for poisoning him. But the value of such a division is a test rather than as the foundation of an opinion. While forming an opinion, one needs to have all the evidence upon which the opinion is to be given present before the mind. The answer to that test may be in the proof of the anomalous character of arsenical symptoms. Whatever the history of the opinions of the attendant physicians may have been, and whatever their value, their final opinion, confirmed by experts, was that the death was caused by arsenic.

The jury acted like men in business, who must act with prompt decision or fail to meet their obligations. Of course it is better practice for a jury to act without fear of the consequences of its verdict to the prisoner than to palter with its own oath to "true deliverance make." Then, if the verdict does not satisfy the community, the political powers can be brought into action, as was done in this case. Thus the system of government is honestly and thoroughly used. Trial by jury is maintained as much for satisfying the people that justice is intended to be sought, without prejudice to any class or person, as for seeking the facts efficiently. The jury is a part of the political as well as of the judicial system; and in a capital case, jurymen who have the sense and courage to render such an awful verdict as guilty, as a simple finding of fact upon the evidence, as they under the judge's instructions understand it, without pretending to a doubt which they have not, and without exercising a discretion which is illegal, fulfil their function both judicially and politically.

This essay is confined to the function of the jury. The case suggests many interesting questions. It seems to have been admirably tried according to English practice. But if a like case were tried by counsel of equally great ability before a court in the United States, where the judge has less power and exceptions could be taken, probably it would not be tried so promptly, would take much longer when tried than the week of this trial, would be



tried more thoroughly as to details of fact and of law, would therefore be even more interesting to the medical as well as to the legal profession; and the prisoner, whether innocent or guilty, would have more opportunities of raising what one or more of the jury would think a reasonable doubt, and, failing that, the chance of getting a new trial upon a point of law. Yet even then, if the final verdict were guilty and the punishment were death or imprisonment for life, some excellent people would blame the jury.

*Charles E. Grinnell.*

30 Court Street, Boston, Massachusetts.

# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

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Charles O. Parish, a member of last year's editorial board of this Review, died at his home on January 3. It is the desire of the members of the present board to pay to his memory the small tribute of acknowledging in these pages their deep regret at his death. Those of us who worked with him, and received his ever ready aid, realize the loss of one who would always have been a true and valuable friend. All recognize how much his untiring labor and clear judgment contributed to the advancement of this paper.

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REAL ESTATE TRUST ASSOCIATIONS — TRUST IS NOT VOID. — The recent case of *Howe v. Morse*, 55 N. E. Rep. 213 (Mass.), presented points of great practical importance. An association was formed in the ordinary way to deal in real estate; land was conveyed to trustees; the association directors were to manage the property, though they could compel sales or long leases only with the consent of three quarters of the shareholders. The shareholders, that is members of the association, had no right in the property itself, had no right to call for partition before a fixed date; the shares were fully transferable; the death of a shareholder was not to terminate the trust. The court refused to declare the trust void, since no interests were created within the rule against perpetuities, and there was no illegal restraint of alienation.

A decision adverse to the trust would — considering the amount of property held in this way — have been most unfortunate, and the case seems quite correct. No one, trustees or shareholders, held any but



present vested interests; and the rule against perpetuities applies only to future interests: the proposition was elaborated by the court. Nor are the restraints which the association imposed on itself illegal. The equitable rights of the shareholders were fully transferable. It is true that the trustees could transfer only with the assent of three quarters of the shareholders: in the same way, a corporation by its by-laws may be able to sell property only with the consent of the majority of its stockholders; in the same way, a partnership conveyance requires the assent of all the partners; or, in an ordinary trust, the power to sell might rest in the discretion of the trustees. In an ordinary trust, where there are several *cestuis*, no one has the power to order a conveyance, — all must join. When the proviso for a three-quarters vote is considered as a restraint on alienation, the focus is all wrong; it is merely the machinery of the trust, — ordinary and useful, — a necessity of the form of joint equitable ownership, and not, in its nature, essentially different from the machinery of the corporation or partnership. The opinion of the court considers the second point, the question of restraints on alienation, most scantily, but the double aspect of the case is important. The rules against restraints and the rule against perpetuities are quite distinct branches of the law; a restraint on alienation is bad or not, without regard to how long it may continue, but there is a most common and disastrous tendency to confuse them.

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COPYRIGHT IN SHORTHAND REPORTS. — The case of *Walter v. Lane*, 68 L. J. Ch. 736, involves a novel point of copyright law. The plaintiffs, proprietors of the London Times, brought an action to restrain the defendant from selling a book in which were printed several speeches already published in the Times. The addresses in question had been delivered by Lord Rosebery on various public occasions, and had been reproduced from shorthand notes of a reporter. The court held, reversing the decision below, that no injunction should be granted. Their view was that, while the Copyright Act did not define "author," it could not be said that a reporter was an author within the meaning of the act, and as such entitled to its protection.

The right which the act was passed to protect is the exclusive right of an author to reproduce copies of an original work. Thus its purpose is to secure to each the benefit of his own labor. The test of what labor is necessary to entitle one to this protection is found in originality, and not in the result produced. Drone, Copyright, 200. The question in the case is, then, whether the work of the reporter was sufficiently original to allow him to claim this benefit. It was shown in evidence that reporters were obliged to use judgment and skill in fitting and revising their reports for publication, and that they differed essentially in their reports of addresses. This evidence led the lower court to grant an injunction on the ground that, though the reporter could not be called the author of the speech, he was the author of the public report of the speech. And thus, in the event of several reports of the same speech, each reporter would be allowed a copyright on his own version. This was thought entirely practicable, since it was shown that, as a matter of fact, reports would differ.

The decision of the upper court in refusing the injunction, however, would seem more sound. The whole purpose of the reporter is to present an accurate report of the utterances of the speaker. It is not his

aim to make an abstract arranged on his own plan, or written in his own language. If it were, he would be entitled to the same protection as the maker of law reports. But his work consists in transcribing his notes, and in perfecting them by correction of slight errors. And in all this it is difficult to see that any great amount of originality is exercised. The fact that he has expended time and money in acquiring the ability to do this sort of work may increase the hardship of his position, but cannot of itself have great weight toward allowing him the copyright. True, copyright law has always regarded liberally the amount of labor necessary to secure its benefits, yet it seems hardly warrantable to bring this case within its scope. The reporter has, indeed, published a report which may differ from others, but it is of something which he did not create, and which required no original research or investigation on his part to prepare. On this point the court forcibly says that, though the report and the speech are different things, still the speech is the only valuable thing in the report. This argument seems convincing and the decision sound.

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THE BURDEN OF PROOF OF TESTAMENTARY CAPACITY. — Until recently the law seemed well settled that the party, for whose case the existence of a will was necessary, must establish its validity. Consequently the burden of proof of the testator's testamentary capacity was conceded to be on the party propounding the will, the effect of the presumption in favor of sanity being merely to shift the duty of going forward with the evidence to the contestants, and not to change the burden of establishing. The jury were not required to say the document was the will of a competent testator when they were in doubt. *Barry v. Butlin*, 2 Moore, P. C. 480; 1 Greenleaf on Evidence, 152, 16th ed. Several recent cases in this country, however, take a contrary view, and hold that the burden of proof upon the whole case rests upon the contestant, and that the presumption of the sanity of the testator is of evidential value. *Sturdevant's Appeal*, 42 Atl. Rep. 70 (Conn.); *Hallenbeck v. Cook*, 54 N. E. Rep. 154 (Ill.). Thayer's Preliminary Treatise on Evidence, 381, clearly points out that, so far as a presumption from being evidence, it is an excuse for not giving evidence, what the Romans called *levamen probationis*. The confusion on this subject is further increased by the decision of the New York Court of Appeals in *Dobie v. Armstrong*, 160 N. Y. 584. While recognizing that "ordinarily the burden of proof is upon the party propounding the will," they hold that § 2653a of the New York Code of Civil Procedure, which enacts that "the decree of the surrogate admitting the will to probate shall be *prima facie* evidence of the . . . validity of such will," . . . casts the burden of establishing the incompetency of the testator on the contestant. The court appeared to consider this the only possible construction. A more obvious interpretation, perfectly consistent with the wording and spirit of the section, which avoids overruling the prevailing doctrine on this subject, would be to hold that the *prima facie* case simply shifted the burden of going forward to the contestant, but did not affect the burden on the proponent of establishing ultimately the question in issue. That latter burden never shifts. *Crowninshield v. Crowninshield*, 2 Gray, 524. Perhaps the court was confused by the two senses in which the term "burden of proof" is used. The decision seems particularly unfortunate, as in a former case the same



court construed a similar enactment in the opposite and the correct way. *People v. Cannon*, 139 N. Y. 32. Unhappily this decision was not brought to the attention of the court in the principal case.

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CONTRACTS FOR THE ALLOTMENT OF SHARES. — Many of the more important of the English cases, which established that a contract by mail is complete on the mailing of the letter of acceptance, were contracts for the allotment of shares. These were always treated by the courts as if they were bilateral contracts. *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216. Yet in none of them was the court expressly called upon to decide whether the contract was bilateral or unilateral. This point would seem to be directly involved in a recent case, — *Re London and Northern Bank Limited*, 81 L. T. Rep. 512. A letter withdrawing an application for an allotment of shares in a stock company was received by the company after the directors had allotted the shares, but before the notice of allotment was mailed. The applicant was held to be entitled to have his name removed from the register of shareholders, and to have his deposit returned.

Though the court follow the previous *dicta*, it would have carried out more nearly the actual intention of the parties had it held an allotment of shares to be a unilateral contract complete on the allotment, and subject only to a defeasance in case of laches in not sending the notice of allotment within a reasonable time. Langdell, *Summary of the Law of Contracts*, § 6. In holding this a bilateral contract, the court would seem to encounter the difficulty of being obliged to hold that the directors could cancel the allotment at any time before the mailing of the notice of allotment. Yet, if that precise case had been presented, it is difficult to believe that the contract would not have been held complete from the time of the allotment, as it was the evident understanding of the parties that the applicant's title to the shares should date from then. Everything that the company was asked to do was already done before the sending of the notice of allotment. How, then, could the sending of this notice be essential to the existence of a contract? And what did the company bind itself by this contract to do? Certainly not to allot the shares. That had already been done. The true view is that the contract is unilateral, and the applicant shows by his language and the nature of the transaction that notice of acceptance is not required, — merely notice of performance. After performance revocation is of course too late. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 262. The point that the contract was unilateral, however, was not taken by counsel, and, considering the number of times the contrary doctrine has been reiterated, this is not surprising.

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OTHER FIRES BY OTHER ENGINES. — In actions against a railroad for damage caused by fire negligently allowed to escape from a locomotive, the courts are not fully agreed as to how far evidence is admissible that other locomotives of the defendant have also emitted sparks and caused fires. Where the particular locomotive which is alleged to have set the fire is unidentified, such evidence is almost always allowed either to establish the negligent construction of the defendant's engines generally, or to show a capacity to emit sparks, and thus that the injury

might have been caused in this way. 1 Greenleaf on Evidence, 85, 16th ed. The dispute arises in regard to the admission of this sort of evidence when the particular one which is claimed to have caused the injury is identified. In some jurisdictions such evidence is admitted as showing a possible cause of the damage. *Sheldon v. The Hudson River R. R. Co.*, 14 N. Y. 218. Other courts lay down the rule that it has not any logical bearing upon the issue. *Gibbons v. Wisconsin Valley R. R. Co.*, 58 Wis. 335. This view has recently received the sanction of the Court of Appeals of Indian Territory, on the ground that, if a defendant is to be held liable for fire set by a particular locomotive, it must be for negligence, not in the operation of defective locomotives generally, but in operating that particular one. *Missouri K. & T. Ry. Co. v. Wilder*, 53 S. W. Rep. 490 (Ind. Ter.).

In a great variety of cases, where the means of proof are necessarily indirect, courts frequently admit as evidence matters of slight weight, simply because nothing better can be had. On this ground rests the admission of evidence of the dangerous character of the defendant's engines generally. Nor does the competency of such evidence depend upon the question whether or not the particular machine which caused the injury be known or not. It would seem to be relevant in either case. After other probable causes have been disproved, evidence that engines used by the company do in fact emit sparks tends to show that the injury complained of might well have arisen from the escape of fire from this particular engine. It is of course open to the defendant to show that any identified engine could not have caused the injury. The Indian Territory case is right in condemning the admission of such evidence to show habitual negligence on the part of the railroad, — although some courts seem to grant its competency for that purpose, *Koontz v. O. R. & N. Co.*, 2 Oreg. 3, — for from that it does not follow that there was negligence in this particular instance. It is in the nature of character evidence, and should not be admitted in civil actions. 12 HARVARD LAW REVIEW, 500. This evidence would seem clearly competent, however, on the grounds indicated above.

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SECRET TRUSTS UPON BEQUESTS. — In disregard of the prohibition by the Statute of Frauds of any oral addition to testamentary documents, courts of equity generally enforce oral trusts intended by the testator to be attached to devises and bequests when communicated to the apparent beneficiary before the testator's death. *Brooks v. Chappell*, 34 Wis. 405. These seem, however, to be enforced as testamentary declarations. In fact, they cannot be treated as express trusts, for the duty does not come into existence at the time of the communication, but only on the death of the testator. The true explanation is, perhaps, that a constructive trust in favor of the intended beneficiary is imposed to enforce specific performance of a contract made by the apparent beneficiary with the testator. *McClellan v. McLean*, 2 Head, 684. Where the legatee expressly assents to the arrangement, it is very easy to work out a unilateral contract, in which the consideration for the promise is the bequest; but it is doubtless an unusual stretching of the principles of contract to find a promise in a mere absence of dissent. However this may be, many courts treat these as cases of constructive fraud simply. But whatever name be given to the reason for reaching this result, it seems that the



principle of specific performance is justly extended to cases where a benefit has been knowingly accepted as consideration for an act. *Administrator v. Rynd*, 68 Pa. St. 386.

An interesting illustration of these principles is seen in *Re Stead*, The Law Times, Dec. 9, 1899. Realty was devised to trustees for conversion, and then to noid for A and B absolutely as joint tenants. A secret trust intended to be imposed upon this latter interest was communicated by the testator before death to A, but not to B. On a bill by A to have the trust declared, the court held that A was bound by this agreement, but B was not. In that respect, at least, this decision is a marked departure from precedent. It is very ancient law that joint tenants are but one person: thus, livery of seisin to one is livery to all, Co. Lit. 496; occupation by one is occupation by all, *Small v. Clifford*, 38 Me. 213. And so it has been held generally that, while only those tenants in common to whom a secret trust has been communicated are bound thereby, communication to one joint tenant, as in the principal case, is sufficient to bind all. *Rowbotham v. Dwinett*, L. R. 8 Ch. D. 430; *Fairchild v. Edson*, 154 N. Y. 199. So much of the principal case, therefore, as denies enforcement of the trust against B cannot, it seems, be supported; otherwise the case follows well-accepted principles.

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UNBORN CHILDREN IN CRIMINAL LAW. — A child *en ventre sa mere* may be the subject of homicide, — this was again illustrated in England last November. Under an indictment for manslaughter it was proved that the prisoner violently assaulted his wife when she was pregnant. Their child — born later otherwise in a healthy condition — had severe bruises received *en ventre sa mere* from the blows of the father. It soon died, and the prisoner was accordingly convicted of manslaughter. Solicitors' Journal, Nov. 25, 1899. The earlier English text-writers with the exception of Lord Hale have declared generally that one who causes the death of a young child by injuring it *en ventre sa mere* is guilty of homicide: 3 Inst. 50; 1 Hawk. P. C. c. 13, § 16; 4 Blackstone, c. 14. And all the judges in *Regina v. Senior*, 1 Moo. C. C. 346, and Mr. Justice Maule in *Regina v. West*, 2 C. & K. 784, without stating reasons followed the prevailing view of the text-writers. On the civil side, one finds but little sanction by analogy for this rule of the criminal law. The recognition of rights of unborn children in the law of property depends on special equitable grounds. Moreover, by the weight of authority a child cannot recover in an action of tort for damage received *en ventre sa mere*. 12 HARVARD LAW REVIEW, 209. The error, however, is not an unnatural one. The early writers felt that he who was instrumental in causing the death of a human being should be punished, and they naturally enough classed this crime as homicide. The offence, however, belongs rather in the category with the crime of the procurement of abortion. It is essential to manslaughter or murder that there be application of force to a subject of the state resulting in death. And the crime in the eye of the law occurs, not at the time and place of the death, but at the time and place of the prisoner's act. Therefore, in an indictment for the manslaughter of a young child from injuries received *en ventre sa mere*, it would be impossible for the state to prove that there had ever been force applied to one of its subjects as a member of society.

DOUBLE EMPLOYMENT OF AGENT. — There is a difference of opinion on the question as to whether the same agent may ever be employed by the buyer and the seller in a single transaction. Upon this point the charge given in *Gracie v. Stevens*, New York Law Journal, Dec. 29, 1899, seems accurately to present the test applied in New York. The plaintiff had acted as agent both for the buyer and for the defendants, who were the sellers. The jury were told that, if the plaintiff was employed by the defendants merely to find a buyer, he was entitled to their verdict; if, however, his acting for the defendants required the slightest use of his own discretion, he could not recover. This test is well recognized in New York. *Empire State Ins. Co. v. American Central Ins. Co.*, 138 N. Y. 446. In many jurisdictions, however, it is disregarded. *Fansen v. Williams*, 55 N. W. Rep. 279 (Neb.); *Porter v. Woodruff*, 36 N. J. Eq. 174. See 9 HARVARD LAW REVIEW, 349.

On principle the New York test seems open to grave objections. It is a fundamental doctrine of agency that the relation between principal and agent is fiduciary in its nature. Whoever, therefore, is employed as an agent owes to his employer the utmost diligence in dealings in his behalf. This, of course, requires an intelligent business method on the agent's part. Now while in any case the business to be done may be simple and known in detail to the agent, there is always the possibility of an unexpected situation requiring the use of discretion. The possibilities of the principal case seem amply to illustrate the point. Granting that the plaintiff was employed merely to find a purchaser, two such may appear who are not equally responsible. Now, if he also be acting for the less responsible, the conflict of interests is apparent. He cannot, with the loyalty which he owes to the defendant, recommend the less responsible; nor can he, in good faith to the buyer for whom he is acting, do less than his utmost for him. In short, unless these contingencies are entirely disregarded, we can only say that, when one may act for one side in a perfectly mechanical capacity, he may also act for the other; but then the fiduciary nature of the former relation is gone, and the case is not one of real agency. There is no real agent who cannot use discretion in an unexpected situation. When both parties consent to a double employment, it is a different question; but it is to be regretted that the cases do not uniformly appreciate that the fiduciary relation between principal and agent is incompatible with a double employment of the agent.

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LIABILITY FOR THE SPREAD OF FIRE. — The New York rule limiting liability for the spread of fire, negligently caused, to the damage resulting to abutting proprietors, has at length been put upon a basis which, though questionable, is at least consistent with itself. *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210, decided in effect that where fire was communicated by a defendant's negligence to the house of A, and thence to the adjoining house of B, the injury to B was, as a matter of law, the remote and not the proximate result of the negligent act. Subsequently this rule was limited strictly to the particular facts, and a recovery was allowed in the case of fires in the country. *Martin v. N. Y. O. & W. R. R.*, 62 Hun 181. The Court of Appeals has now decided, however, that such a rural non-abutting proprietor may not recover. Fire was communicated from the defendant's engine to rubbish negligently allowed to accumulate along the defendant's roadway, and thence burnt over the forest



lands of intermediate owners to the plaintiff's woodland two miles away. A judgment for the plaintiff was reversed in the Court of Appeals on the ground that the injury was not the proximate result of the defendant's negligent act, it not being a foreseeable consequence that the fire would spread beyond abutting lands, and the drought, atmosphere and wind being intervening causes of the damage. *Hoffman v. King et al.*, 55 N. E. Rep. 401 (N. Y.).

By the overwhelming weight of authority the defendant would be held liable in this case. *W. & St. P. R. R. Co. v. Kellogg*, 94 U. S. 469; 1 Shearman and Redfield on Negligence, § 30, 5th ed. And on principle it would seem that a recovery should be allowed. To incur liability for a negligent act, it must be the proximate and not the remote cause of the injury. It is everywhere granted that any injury which is the natural and probable consequence of the negligence is deemed proximate, provided no independent agency has intervened. Nor can the drought and high wind be considered as intervening causes. They are merely conditions surrounding the act at the time of its performance. Hence they really form part of the defendant's tortious act, for negligence is the failure to use due care under all the attendant circumstances. Clearly, therefore, a jury might have found that such an injury was reasonably foreseeable, that is, natural and probable. *Fent v. T. P. & W. R. R. Co.*, 59 Ill. 349. Nor can mere diversity of ownership make any difference; for there is no logic in saying that the probability of a certain tract of land being injured by the defendant's negligence is determinable according as it is owned by one person or by several. The argument that this extent of liability might result in the ruin of the defendant is answered by saying that there is more justice in letting a wrongdoer be ruined by his negligence than in allowing him by it to bring ruin upon other and innocent persons. See *Hoyt v. Jeffers*, 30 Mich. 181. The decision in the principal case, therefore, while consistent in a New York court, would seem to be unsupportable on grounds either of principle or expediency.

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## RECENT CASES.

**ADMIRALTY — FORFEITURE — DEGREE OF PROOF.** — In a proceeding by the government for the forfeiture of a vessel, because of a violation of her license by carrying smuggled goods, *held*, that the prosecution can prove its case by a preponderance of the evidence. *The Good Templar*, 97 Fed. Rep. 651 (Dist. Ct., Mass.).

This decision is opposed to the authorities and seems questionable upon principle. The proceeding, though civil in form, is clearly criminal in its nature, being instituted by the government in order to punish a breach of its laws. The government should therefore be obliged to prove its case beyond a reasonable doubt. Such is the view adopted by two previous decisions in the federal courts. *United States v. The Burdett*, 9 Pet. 682; *United States v. Shapleigh*, 12 U. S. App. 26. In a similar class of cases, where a suit is brought to recover a statutory penalty, the uniform rule is that the defendant is within the constitutional guaranty in criminal cases, and cannot be compelled to testify against himself. *Boyd v. United States*, 116 U. S. 616; *Lees v. United States*, 150 U. S. 476.

**AGENCY — REVOCATION — TIME OF TAKING EFFECT.** — After a letter revoking the plaintiff's authority to sell stock had been delivered at the plaintiff's usual place of business, but before it had come to his knowledge, the principal sold the stock to persons with whom the plaintiff had previously negotiated. *Held*, that the plaintiff cannot

recover commission, since the determination of the agency, without fraudulent purpose prevented his fulfilling his side of the contract. *Rees v. Fallow*, 97 Fed. Rep. 167 (C. C. A., Sixth Cir.).

The precise line of reasoning is difficult to ascertain, but it seems clear that the court intended to lay down the proposition that here the agency was terminated by the delivery of the revocation at the plaintiff's usual place of business. Although judicial decision on this exact point is lacking, it has been said that a revocation only takes effect when it is made known to the agent. Story, Agency, 9th ed., § 470. But a revocation does not require mutual assent, and it is hard on the principal to require that he should do more than accomplish all things reasonably necessary to put the revocation in the power of the agent. Such reasoning has been applied in regard to the revocation of a reward. *Shuey v. United States*, 92 U. S. 73. Hence the view of the principal case on this point seems proper. But it may be questioned whether the decision might not have been placed on the simple ground that, whether or not the agency was terminated, the facts did not show the plaintiff's instrumentality in bringing about the final contract. *Wylie v. Marine Nat. Bank*, 61 N. Y. 415.

**BANKRUPTCY — DISSOLUTION OF LIENS — VOLUNTARY AND INVOLUNTARY CASES.** — Held, that a levy of execution upon personal property within four months is dissolved by the adjudication of the debtor as a voluntary bankrupt. *Re Vaughan*, 97 Fed. Rep. 560 (Dist. Ct., N. Y.).

The Bankruptcy Act of 1898, § 67 f, provides that all levies against a debtor "four months prior to filing of a petition in bankruptcy against him" shall be void. Upon a literal construction of this provision, some courts have held that it applies only to cases of involuntary bankruptcy. *Re De Lue*, 91 Fed. Rep. 510 (Dist. Ct., Mass.); *Re Easley*, 93 Fed. Rep. 419 (Dist. Ct., Va.). But upon a broader construction of the section, other cases have held that it applies to both voluntary and involuntary bankruptcy. *Re Brown*, 91 Fed. Rep. 359 (Dist. Ct., Va.); *Re Richards*, 95 Fed. Rep. 258 (Dist. Ct., Wis.). The latter cases are supported by section 1 (1) which provides that "a person against whom a petition has been filed shall include a person who has filed a voluntary petition." Moreover, the former construction is a manifest subversion of the policy of the act, which is to prevent preferences and secure an equal distribution of the assets, whether the bankruptcy be voluntary or involuntary. Accordingly the principal case is to be commended.

**BILLS AND NOTES — ACTION BY INDORSEE — TIME OF INDORSEMENT.** — In a suit on a promissory note it appeared that the plaintiff was merely the assignee of the note at the time of bringing the action, but that the note was indorsed to him before the trial. Held, that the action cannot be maintained. *Burch v. Daniel*, 34 S. E. Rep. 310 (Ga.).

This case follows the general rule that the plaintiff must have the legal title to the note in suit at the time of action brought. *Vila v. Weston*, 33 Conn. 42; *Dowell v. Brown*, 21 Miss. 43. It is true that the plaintiff, as in the principal case, may be the real party in interest without having the legal title; but whether or not he is a holder in due course, and thus what defences are open to the maker, depends upon the date of the indorsement. *Whistler v. Forster*, 14 C. B. N. S. 248. It is, therefore, a substantial reason for the general rule that, if the plaintiff is allowed to found his action on an indorsement before the date of the writ and rely on a later one at a trial, he may work a surprise on the defendant and deprive him of the opportunity of establishing a valid defence. It has been held, however, in some cases, that an indorsement at any time before the trial is sufficient. *Brown v. McHugh*, 35 Mich. 50; *Weeks v. Medler*, 20 Kan. 57.

**BILLS AND NOTES — DISCOUNT AT USURIOUS RATE — AMOUNT OF RECOVERY.** — The plaintiff discounted notes for the defendant, taking out interest at a usurious rate. Held, that the transaction imports a sale, which is not affected by the usury statute, and the plaintiff can recover the amount advanced, with legal interest. *Cook v. Forker*, 44 Atl. Rep. 560 (Pa.).

This decision is supported by the weight of authority. *Cram v. Hendricks*, 7 Wend. 569; *French v. Grindle*, 15 Me. 163. Several courts, however, hold that such a transaction, owing to the indorser's conditional liability, is in substance a loan, and is made unenforceable by the statute of usury. *McElwee v. Collins*, 4 Dev. & Bat. 259; *Cowles v. McVickar*, 3 Wis. 725. The question is really one of fact, whether the parties intend a bona fide sale of the notes, or merely adopt this form in order fraudulently to avoid the statute. *Nichols v. Fearson*, 7 Pet. 103; *Belden v. Lamb*, 17 Conn. 441. When there is no evidence of fraud, the view taken of the transaction in the principal case seems the more reasonable and just. As to the amount of recovery, however, the



decision is hardly to be supported, since the liability of an indorser, as of any surety, is to pay the full amount of the obligation. This latter view has considerable support in the authorities. *Roark v. Turner*, 29 Ga. 455; *National Bank of Michigan v. Green*, 33 Iowa, 140.

**CARRIERS — LOSS OF BAGGAGE — LIABILITY OF STEAMSHIP COMPANIES —** *Held*, that, unless negligence is shown, a steamship company is not liable for baggage stolen from a passenger's stateroom. *The Humboldt*, 97 Fed. Rep. 656 (Dist. Ct., Wash.).

The case is supported by the great weight of authority. *Clark v. Burns*, 118 Mass. 275; *American Steamship Co. v. Bryan*, 83 Pa. St. 446. The contrary New York doctrine is based on the idea that a passenger steamboat is in effect a floating inn, and should, therefore, be subjected to the absolute liability of an innkeeper. *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. 229. The reason for the strict liability of an innkeeper is the purely historical one that in olden times inns were sought chiefly for protection. No such reason applies in the case of steamboats, and it is more in accord with the dictate of justice and the tendency of the modern law to restrict the rule as to innkeepers' liability to its original limits. The New York doctrine has not been extended to the case of sleeping car companies even in New York state. *Carpenter v. New York, etc. R. R. Co.*, N. Y. 53; 124 *Pullman Palace Car Co. v. Smith*, 73 Ill. 360.

**CARRIERS — SHIPMENT OF CONCEALED VALUABLES WITHOUT NOTICE.** — Valuable books were concealed in a bale, designated in the bill of lading as "worn clothing," and the bale was lost in transit. *Held*, that the shipper is guilty of fraud, destroying his claim to recover the value of the books, but that he can recover for the loss of the clothing. *The Saint Cuthbert*, 97 Fed. Rep. 340 (Dist. Ct. N. Y.).

The result reached is in accord with all the authorities on the point. *Chicago & Alton R. R. Co. v. Shea*, 67 Ill. 471. However, the reasoning of the case seems untenable. If, as is said, the fraud of the shipper caused the loss of the bale by lessening the care of the carrier, the carrier should not be held liable for the loss either of the books or of the clothing. On the other hand, if the fraud did not cause the loss of the bale, it was wholly immaterial. The case, however, can be supported on the ground that, while the carrier was clearly a bailee of the clothing, he did not consent to take possession of the books, and therefore was not liable as a carrier for their loss. *Regina v. Finlayson*, 3 N. S. W. Rep. 301; *Merry v. Green*, 7 M. & W. 623.

**CONSTITUTIONAL LAW — ASSESSMENTS — LOCAL PUBLIC IMPROVEMENTS.** — *Held*, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially benefited. *Walsh v. Barron*, 55 N. E. Rep. 164 (Ohio). The courts generally laid down the rule stated in the present case, but they differ greatly in its application. The better view is that, although the property should be taxed only to the amount that it is specially benefited, that amount is primarily a question for the legislature, to be reviewed by the courts only when the assessment is so excessive as to be beyond the bounds of reason. *Spencer v. Merchant*, 100 N. Y. 585; 2 Dill. Mun. Cor. § 761. In a few jurisdictions the question is treated as belonging to the judiciary in the first instance, and an assessment by the legislature will be reversed if in the opinion of the court, it is more than the actual benefit conferred, although not necessarily so excessive as to be unreasonable. *Norwood v. Baker*, 172 U. S. 269; *State v. Newark*, 37 N. J. Law, 415. Though the decision in the present case does not distinctly state the view it follows, it would seem from the language that the latter doctrine is preferred, and hence, while the result reached is correct, the reasoning is open to criticism.

**CONSTITUTIONAL LAW — POLICE POWER — CLASS LEGISLATION.** — The Colorado legislature passed an act forbidding laborers to work in underground mines and smelters more than eight hours a day. *Held*, that the act is unconstitutional, as being class legislation. *In re Morgan*, 58 Pac. Rep. 1071 (Colo.).

It would seem to be no objection to a legislative act to say that it is "class legislation," — an expression without any historical significance in the law. It is not seriously contended that the act in question violates any special provision of the Colorado constitution, but that it is not a proper exercise of the "police power," which is conceived of as a distinct head of legislative power capable of somewhat exact definition, under which alone the act can be justified. In truth, the only question for the court was whether the legislation could be considered the process of law, which depends upon whether the legislature acted arbitrarily in its restraint of individual rights. *Hurtado v. California*, 110 U. S. 516. The expediency of particular legislation is for the legislature. The judicial question is whether the legislature, in its determination of what the public wel-

fare requires, has gone beyond the bound of reason, and not what the court, sitting as legislators, might have thought proper. *Powell v. Pennsylvania*, 127 U. S. 678.—Sub-  
 jected to this test, it must be said that the act in question is constitutional. *Holden v.  
 Hardy*, 169 U. S. 366. An omission to observe the exact nature of the judicial inquiry  
 in cases of this kind has resulted in a large number of decisions which, in any proper  
 view, must be regarded unsound. *State v. Loomis*, 115 Mo. 307.

CONTRACT — ALLOTMENT OF SHARES — WITHDRAWAL OF APPLICATION. — A  
 letter withdrawing an application for shares in a stock company was received by the  
 company after the allotment of the shares, but before the notice of allotment was  
 mailed. *Held*, that the applicant is entitled to have his name removed from the register  
 of shareholders and his deposit returned. *Re London & Northern Bank Limited*, 81  
 L. T. Rep. 512. See NOTES.

CONTRACTS — CONTINUING OFFER — REVOCATION. — The plaintiff made a proposal  
 to the defendant, assented to by the latter, to furnish crushed stone at a certain price  
 for two months "in such quantities as may be desired." After filling a few orders, the  
 plaintiff refused to furnish any more stone. In an action for the price of that already  
 furnished, *held*, that the defendant has no counter-claim for the plaintiff's default.  
*Hoffman v. Maffioli*, 80 N. W. Rep. 1032 (Wis.).

The result reached in the principal case is doubtless correct, and is in accord with the  
 weight of authority. *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16; *Chicago,  
 etc. Ry. Co. v. Dune*, 43 N. Y. 240; *Thayer v. Burchard*, 99 Mass. 508. The court  
 seems, however, inclined to follow the reasoning of a Minnesota case, *Bailey v. Aus-  
 trian*, 19 Minn. 535, and hold that, although there was a promise on either side, no  
 contract was made, since the plaintiff did not absolutely undertake to do anything at all.  
 The more correct ground for supporting the result is that the defendant, by assenting to  
 the proposition of the plaintiff to furnish stone "in such quantities as may be desired,"  
 did not put himself under any obligation to the plaintiff to order from him any stone  
 which he might use. Hence there were no mutual promises, and the plaintiff's proposi-  
 tion was merely a continuing offer revocable at any time. Until revoked, the separate  
 orders of stone were separate acceptances of the offer, making a series of bilateral agree-  
 ments.

CRIMINAL LAW — WHAT CONSTITUTES ASSAULT. — On evidence that, during a  
 scuffle, the accused drew from his pocket a pistol which caught in his coat, the jury  
 convicted him of assault with intent to kill. *Held*, that the verdict is not supported by  
 the evidence. *Burton v. State*, 34 S. E. Rep. 286 (Ga.).

That immediate injury should be threatened is necessary to constitute an assault.  
*Stephens v. Myers*, 4 C. & P. 349. On the question of fact as to whether the injury  
 threatened by the mere drawing of a pistol is immediate or not, it seems that the jury  
 might well find either way, according to the circumstances of the case. The principal  
 case, in holding that such an act is never more than mere preparation, draws a conclu-  
 sion with an absoluteness that neither the facts nor the authorities justify. *State v.  
 Sullivan*, 43 S. C. 205; *State v. Church*, 63 N. C. 15; *People v. McMakin*, 8 Cal. 547.  
 It is not, however, without support. *Lawson v. State*, 30 Ala. 14.

EVIDENCE — ADMISSIONS — DECLARATIONS AGAINST INTEREST. — In an action by  
 the widow for the death of her husband, *held*, that the statements of the deceased, tend-  
 ing to show that his injuries were received as the result of his own actions, are admissi-  
 ble. *Fitzgerald v. Georgia R. R., etc. Co.*, 34 S. E. Rep. 316 (Ga.).

The court admits the evidence upon two grounds, holding the statements to be either  
 admissions by one who is a privy in law with a party to the suit, or else declarations of a  
 third party against his own interest. The decision can hardly be supported on either  
 ground. Admissions are only good against the declarant, or those identified in interest  
 with him. *Greenl. Ev.* 16th ed., § 171; *Spargo v. Brown*, 9 B. & C. 935. The prin-  
 cipal case might come within this rule if the plaintiff took her claim from her husband,  
 but the act gave her an entirely new cause of action. Accordingly, she should be un-  
 affected by any admission of her husband. As to the second ground, the court based  
 its decision on a statute, which, however, seems to be merely declaratory of the com-  
 mon law rule that the declaration of a deceased person against his pecuniary interest is  
 admissible. *The Sussex Peatrage Case*, 11 Cl. & F. 85; *Mahaska Co. v. Ingalls*, 16 Iowa,  
 81. While the declarations in this case were in a sense against the pecuniary interest  
 of the deceased, such interest, being purely contingent, seems on established grounds too  
 remote to bring them within the exception. *Smith v. Blakey*, L. R. 2 Q. B. 326. See,  
 however, in accord with the principal case on the latter point, *Walker v. Brantner*,  
 59 Kan. 117.



**EVIDENCE — COLLATERAL ISSUES — TENDENCY TO CONFUSE JURY.** — *Held*, that the court will exclude evidence, though logically relevant, which has a tendency to confuse the jury and to protract the trial beyond reasonable limits. *Golden Reward Mining Co. v. Buxton Mining Co.*, 97 Fed. Rep. 414 (C. C. A., Eighth Cir.).

The case lays down the correct, though often neglected, rule. The admissibility of such evidence depends upon whether, in the opinion of the trial judge, a clear inference can be drawn without going into such details as would confuse the jury and unnecessarily protract the case. *Emerson v. Lowell Gas Light Co.*, 85 Mass. 410; *Temperance Hall Ass'n v. Giles*, 33 N. J. Law, 260. Some courts, however, neglect this rule, and admit such evidence without question. *House v. Metcalf*, 27 Conn. 631; *Calkins v. City of Hartford*, 33 Conn. 57.

**EVIDENCE — DYING DECLARATIONS — QUESTION FOR COURT.** — In a prosecution for homicide, the declarations of the deceased were offered in evidence. *Held*, that the declarations and the evidence as to the circumstances under which they were made may be left in the first instance to the jury, with instructions to disregard the declarations if not made in fear of approaching death. *Bush v. State*, 34 S. E. Rep. 398 (Ga.).

The principal case represents the settled rule in the state of Georgia. *Mitchell v. State*, 71 Ga. 128. The entire weight of authority is, however, *contra*. *People v. Smith*, 104 N. Y. 491; *Westbrook v. People*, 126 Ill. 81; *Regina v. Hucks*, 1 Stark. 521. The usage seems on principle incorrect. In such cases there are always two questions: first, the admissibility of the declaration, and, second, the credence to be given it. The former is always a question for the court, and the latter for the jury. 1 Greenl. Ev., 16th ed., § 161 b. To be sure, the jury have the power to disregard the declarations as being unworthy of belief when the question is once before them, but it is the duty of the court to decide in the first place that the declarant was apprehensive of death when he made the statements, since on that their admissibility depends. *State v. Norton*, 121 Mo. 537.

**EVIDENCE — NEGLIGENCE — RESULTS IN SIMILAR CASES.** — In an action against a railroad for damages caused by an engine emitting sparks, the engine complained of being identified, *held*, that evidence of other engines of the defendant emitting sparks on other occasions is not admissible. *Missouri, etc., Ry. Co. v. Wilder*, 53 S. W. Rep. 490 (Ind. Ter.). See NOTES.

**EVIDENCE — OPINION — HYPOTHETICAL QUESTIONS.** — Experts were asked whether assuming the evidence to be true, the defendant was, in their opinion, insane. Many witnesses had been examined, and the testimony was voluminous, although not contradictory. *Held*, that the question was a proper one. *Cornell v. State*, 80 N. W. Rep. 745 (Wis.).

The Wisconsin court holds such a question improper where the evidence has been contradictory, on the ground that it allows the expert to usurp the function of the jury. *Bennett v. State*, 57 Wis. 69. The soundness of such reasoning may be doubted, since the jury are not bound to accept the opinion of the expert. *United States v. McGlue*, 1 Curt. C. C. 1. The true objection to the question when the evidence is contradictory lies in the danger that the expert may not find the facts as the jury does, and that therefore his conclusion may be drawn from different premises, and so worthless or misleading. The same sort of objection might be urged against the question in the principal case. It is possible that the expert may not remember fully all the facts, or that he may not recall them as the jury does. Although it seems better on these grounds to exclude such questions under the circumstances of the principal case, they are sometimes allowed. *State v. Hayden*, 51 Vt. 304.

**EVIDENCE — PREVIOUS WRONGFUL ACTS.** — In a proceeding against a bank president for making false reports to the comptroller, in order to mislead the authorities as to the bank's financial standing, evidence that he had made a similar false report four months before was offered. *Held*, that it is admissible on the question of the intent with which the later false reports were made. *Bacon v. United States*, 97 Fed. Rep. 35 (C. C. A., Eighth Cir.).

Testimony as to former wrongful acts of a defendant is in general inadmissible. *Commonwealth v. Jackson*, 132 Mass. 16. Such evidence is, however, admitted to prove intent, where it can be shown that all the acts are part of a general scheme. *Commonwealth v. Robinson*, 146 Mass. 571. The principal case is a weaker one than that, however. It must, then, be a practical question for the trial court as to whether the probative quality of such testimony is strong enough to demand its admission, notwithstanding the prejudice against the accused it is likely to arouse in the minds of the jury. 1 Greenl. Ev., 16th ed., § 14 a. Since, then, the admission of such evidence is dis-

cretionary with the trial judge, his ruling ought not to be revised, unless it appears that the result could not have been reasonably reached. On this ground the upper court's refusal to reverse the judgment of the lower court seems correct.

**EVIDENCE—TESTAMENTARY CAPACITY—BURDEN OF PROOF.**—Section 2653 a of the New York Code of Civil Procedure enacts that the probate of a will shall be *prima facie* evidence of its validity. *Held*, that, after the will is admitted to probate, the clause casts the burden of establishing the testamentary incapacity of the testator upon the contestant. *Dobie v. Armstrong*, 160 N. Y. 584. See NOTES.

**GARNISHMENT—FUNDS IN HANDS OF COURT.**—After satisfaction of judgment from the proceeds of an attachment sale, a surplus remained in the hands of the clerk of the court. *Held*, that this surplus cannot be garnished. *Allen v. Gerard*, 44 Atl. Rep. 592 (R. I.).

Generally, funds in the hands of an officer of the court cannot be garnished. There is, however, a direct conflict of authority when, as in the principal case, the final disposition of the fund is determined. It has been held that such a fund can be garnished. *Wilbur v. Flannery*, 60 Vt. 581; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522; *Weaver v. Davis*, 47 Ill. 235. But an abundance of authority, in accord with the principal case, takes the opposite view. *Lord v. Collins*, 79 Me. 227; *Pace v. Smith*, 57 Tex. 555; *Tremper v. Brooks*, 40 Mich. 333. The sole duty of the clerk of the court is to hold the funds for the court, and therefore garnishment of such funds is really a proceeding against the court. Public policy and the orderly administration of justice require that the court be approached by petition, and not by mandatory proceedings, and hence the principal case is to be supported.

**PERSONS—INFANTS' CONTRACTS—RECOVERY OF CONSIDERATION.**—The plaintiff, an infant, agreed to purchase a bicycle on instalments. She used it three months and then returned it, demanding the money she had paid. *Held*, that the plaintiff cannot recover. *Rice v. Butler*, 53 N. E. Rep. 275 (N. Y.).

This decision reverses the decision in the lower court, 12 HARV. LAW REV. 63. It is *contra* to the American cases directly in point, *McCarthy v. Henderson*, 138 Mass. 310, *Whitcomb v. Joslyn*, 51 Vt. 79, but in accord with the English decisions. *Valentini v. Canali*, 24 Q. B. D. 167. And several American cases, which quote the English cases with approval, are indistinguishable in principle. *Johnson v. Northwestern, etc. Ins. Co.*, 56 Minn. 365. The result reached is desirable, for the protection of the infant is not interfered with, while he is forbidden to use his infancy to defraud. It has been objected to this view that it allows recoupment, where the infant would have a good defence to an action for the price, and so practically holds him on his contract. The principal case overcomes this objection on the ground, that to the extent that the amount paid equals the benefit the infant has received under the contract, the contract is executed and reasonable, and therefore the infant cannot recover, because he cannot return the consideration. The reasoning seems sound, and the result is surely to be commended.

**PROCEDURE—JUDGMENTS—SET-OFF AFTER ASSIGNMENT.**—A statute provided that, after the assignment of a contract, no claims upon such contract should be set off against the assignee, unless they were in existence at the time of the assignment. The plaintiff is the assignee of a contract on which the defendant had a claim for damages against the assignor. *Held*, that a judgment on this claim obtained subsequent to the assignment may be set off against the plaintiff. *Bacon v. Reich*, 80 N. W. Rep. 278 (Mich.).

It is clear that at the time of the assignment the plaintiff's claim was subject to the defendant's right to recoup his damages, since the assignee of a chose in action has no better rights than his assignor. *Young v. Kitchen*, L. R. 3 Ex. D. 127. The plaintiff claims, however, that no set-off should be allowed against him in this action, since the judgment, which came into existence after the assignment, is barred by the statute, and the claim for damages no longer exists, having merged in the judgment. This objection, if allowed, would have resulted in obvious injustice to the defendant, and is based on a pure technicality. *Clark v. Rowling*, 3 N. Y. 216; *Second Nat. Bank v. Townsend*, 114 Ind. 534. The statute is hardly intended to prohibit the set-off of a claim in existence at the time of the assignment, but which has subsequently been changed in form.

**PROPERTY—CONDITIONAL SALE—RIGHTS OF ADMINISTRATOR.**—The decedent, a retailer, purchased part of his stock in trade under an agreement that the title should remain in the vendor until payment. At his death he was insolvent, and his adminis-



trator, without knowledge of the terms of the contract, sold the goods in question. *Held*, that the vendor is not entitled to recover the full value of the goods thus sold, but must come in with the general creditors. *In re Osburn's Estate*, 58 Pac. Rep. 521 (Oreg.).

In this class of transactions, the intention manifestly is that the vendee shall treat the goods as he does the rest of the stock, and there is, therefore, implied in the transaction a power to sell in the usual course of business. *Spooner v. Cummings*, 151 Mass. 313. But it seems that the decedent himself would not have had a right to sell, knowing he was insolvent, as this would not be within the terms of the power, which applies only to the usual course of a solvent business. The administrator succeeds to the contract rights of the decedent, *Woods v. Ridley*, 27 Miss. 119, but his duty is only to close up the business of the decedent. *Walls v. Walker*, 37 Cal. 424. Accordingly, any such sale by him for the benefit of an insolvent estate, or, indeed, any sale, whether the estate is insolvent or not, would be outside the terms of the power to sell in the regular course of business. The fact that the administrator acted without knowledge of the terms of the contract is, therefore, immaterial, and the vendor in the principal case should have recovered the value of the goods.

**PROPERTY — COPYRIGHT — SHORTHAND REPORTS.** — The plaintiff brought an action to restrain the defendant from selling a book which contained public speeches taken from shorthand reports published in the plaintiff's newspaper. *Held*, that the plaintiff can claim no copyright in such reports. *Walter v. Lane*, 68 L. J. Ch. 736. See NOTES.

**PROPERTY — COVENANT TO FENCE — EASEMENT.** — In a conveyance of the fee, the grantor covenanted to build and maintain a fence, or not to hold the grantee liable for damages to his cattle. *Held*, that the covenant is merely personal and does not bind the grantor's heirs or assigns. *Brown v. Southern Pac. Co.*, 58 Pac. Rep. 1104 (Oreg.).

The statute of 32 Henry VIII., c. 34, provided that the burden should run in covenants contained in leases for life or for years, although the heirs and assigns of the grantor were not mentioned. It was early held that even then a covenant would not run with the land unless it concerned a thing *in esse*. *Spencer's Case*, 5 Co. 16 a. The result in the decision under consideration was reached by applying the distinction taken in Spencer's case between things *in esse* and not *in esse*. But this distinction is purely technical, and ought only to be applied where the question is the same as in that case. *Kellog v. Robinson*, 6 Vt. 276; *Fitch v. Johnson*, 104 Ill. 111; *Morse v. Aldrich*, 36 Mass. 449 (*semble*). The decision of the principal case is more properly supported on another ground. If the parties intended by this covenant to create an easement, mention of the grantor's heirs and assigns is not essential. *Lathrop v. Elsner*, 93 Mich. 599. But the omission of these words is a material circumstance in determining what intent the parties actually had. It seems, therefore, a reasonable construction to say that the grantor intended a personal covenant rather than an easement.

**PROPERTY — EXECUTORS — LIABILITY OF SURETIES.** — A statute provided that debts due from an executor to his testator should be assets of the estate, to be accounted for in the same manner as debts due from strangers. The defendants were sureties on the bond of an executor who was indebted to the estate, and had been insolvent during the whole period of administration. *Held*, that they are liable for the face value of the debt, without regard to his insolvency. *Judge of Probate v. Sulloway*, 44 Atl. Rep. 720 (N. H.).

The decision proceeds upon the theory that the statute makes the executor liable to account for the amount of the debt as so much money belonging to the estate. The statute, however, designates the chose in action as the asset, and it is difficult to see on what principle it is held to make the executor accountable in his official capacity for more than the actual value of the debt; and the obvious injustice of charging the sureties of an executor with the face value of a worthless obligation, simply because the executor happens to be also the debtor, is clear. The question is a new one in New Hampshire, and the solution of it in the principal case finds no support in other jurisdictions, where the inability of the executor to pay his personal debts appears always to have been considered a defence in an action against his sureties. 2 Woerner, Administration, § 512; *McCarty v. Frazer*, 62 Mo. 263; *Lyon v. Osgood*, 58 Vt. 707; *Baucus v. Barr*, 45 Hun 582.

**PROPERTY — RULE AGAINST PERPETUITIES — RESTRAINT ON ALIENATION.** — In an ordinary real estate trust association, with transferable shares, the trustees could sell only with the consent of three quarters of the stockholders. *Held*, that the trust is not void. *Howe v. Morse*, 55 N. E. Rep. 213 (Mass.). See NOTES.

**PROPERTY — WILLS — EXECUTION IN PRESENCE.** — Witnesses signed a will in the same room with the testator. He could see them, but was not in a position to see the paper itself. *Held*, that the will is not duly executed. *Burney v. Allen*, 34 S. E. Rep. 500 (N. C.).

The court relied on an earlier case in which the circumstances were the same, except that the witnesses were in another room. *Graham v. Graham*, 32 N. C. 219. Even granting the doubtful soundness of that decision, *Riggs v. Riggs*, 135 Mass. 238, it can hardly justify the determination in the principal case. The question being one of physical presence, it has been fully established that that requisite is fulfilled if the witnesses are in the same room as the testator at the time of execution, and the latter is not physically unable to move. Such, indeed, is the common sense of the matter. *Newton v. Clarke*, 2 Cur. Ecc. 320; 1 Jar. Wills, 89. An attestation like that in question has, in fact, been held sufficient in North Carolina. *Bynum v. Bynum*, 33 N. C. 632. The principal case is indistinguishable from that last cited, and it might better have been followed than the earlier North Carolina case.

**QUASI-CONTRACTS — RECOVERY OF MONEY PAID TO SECOND ASSIGNEE OF CHOSE IN ACTION.** — The defendant had taken as collateral security an assignment of a bond and mortgage given by the plaintiff. The plaintiff paid the assignee, and the securities were cancelled, both parties being in ignorance of a previous recorded assignment. The plaintiff, having been compelled to pay the prior assignee, sued to recover the money paid to the defendant. *Held*, that he cannot recover. *Behring v. Somerville*, 44 Atl. Rep. 641 (N. J., C. A.).

This decision appears to be based on the familiar principle that as between two parties having equal equities, one of whom must suffer, the loss should lie where it has fallen. *Price v. Neal*, 3 Burr. 1354; *Merchants' Insurance Co. v. Abbott*, 131 Mass. 397. It would seem, however, that the rule could not properly be applied in this case. The legal title to the securities was in the prior assignee by virtue of his assignment, and their cancellation clearly amounted to a conversion. The defendant, therefore, however innocent he was, having obtained the sum in controversy by an unlawful use of the prior assignee's property, held it as constructive trustee for him. It follows that the plaintiff should have recovered, since he had been forced to pay the prior assignee, and was thus subrogated to his rights against the defendant. The most familiar application of this rule is found in the cases where the maker of a note or the drawee of a bill, who has paid one who holds under a forged indorsement, is allowed to recover from the victim of the forgery. *Star Insurance Co. v. New Hampshire Bank*, 60 N. H. 442; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; 4 HARV. LAW REV. 297, 307.

**TORTS — NEGLIGENCE — PROXIMATE CAUSE.** — The defendant negligently set fire to the forest land of his neighbor, whence it spread and damaged the plaintiff's land beyond. *Held*, that the plaintiff cannot recover, as the injury was not the proximate result of the defendant's negligence. *Hoffman v. King*, 55 N. E. Rep. 401 (N. Y.). See NOTES.

**TRUSTS — CONSTRUCTIVE TRUSTS — SERVANT OF TRUSTEE.** — The defendant was a servant of the trustee of the plaintiff, and wilfully misapplied the trust funds which were in his hands. *Held*, that he is not personally liable, since a servant cannot have possession. *Hodgson v. St. Paul Plow Co.*, 80 N. W. Rep. 956 (Minn.).

This decision seems indefensible. It is true that an agent or servant of a trustee is generally only accountable to his employer, and is under no obligation to the *cestui* merely because he has in his hands funds belonging to the latter. *Keane v. Roberts*, 4 Mad. 322; *Tyler v. Tyler*, 3 Beav. 550; *Gray v. Johnson*, 3 App. Cas. 1. But the court in the principal case has entirely overlooked the rule that such a servant or agent can by his own wrongful act make himself a constructive trustee for the *cestui*. *Re Barney* [1892] 2 Ch. D. 265; *Lee v. Sankey*, L. R. 15 Eq. 204. It is on this ground that the defendant's servant should clearly, in all jurisdictions, be held personally liable. *Lewin, Trusts*, 10th ed., 205.



## REVIEWS.

A SELECTION OF CASES AND STATUTES ON THE PRINCIPLES OF CODE PLEADING. By Charles M. Hepburn. Cincinnati: W. H. Anderson & Co. 1899. pp. 160.

These pages form the first installment of the latest addition to the constantly increasing number of case-books intended for class instruction. The publishers announce that it is the result of the advantages derived by Mr. Hepburn, as a lecturer in the Law Department of the University of Cincinnati, by a change from the older method of instruction to the study of cases and statutes at first hand. The first part states briefly the origin and nature of code pleading, and then treats by statutes and decisions, the doctrine of the reduction of all civil actions to one form. Other parts to follow will deal with parties to actions, joinder, defences, etc. Mr. Hepburn's ability to treat the subject is assured by his clear statements of its principles in his work on the "Development of Code Pleading." The authorities are well chosen and arranged. The book promises to become somewhat elaborate and bulky, considering the small amount of time generally allotted to the study of this subject. It will form a very useful volume in schools, where it is felt that sufficient knowledge of pleading is obtained by study of the present, often varying codes, without familiarizing the student with the fundamental principles of the common-law system, affording him the accompanying advantages in analysis of facts and applications of principles.

J. I. W.

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SOME RECENT CRITICISM OF GELPEKE VERSUS DUBUQUE. By Thomas Raeburn White. Philadelphia. 1899. pp. viii, 96.

Mr. White is right in thinking that few cases have given rise to more diversity of opinion than *Gelpeke v. Dubuque*. The law of the case is established beyond question; its justification still has a theoretical interest sufficient to excuse an addition to the literature on the subject. Mr. White has made such an addition, a real addition because of the novelty of the writer's point of view: his treatment is plausible and ingenious, and no less interesting because of its unsoundness.

The doctrine of the case is, briefly, that where a contract is entered into, which is valid under the law of the state of its making as then laid down by the courts of the state, it will be enforced by a federal court having jurisdiction of the parties, even if the state courts, having overruled their previous decisions, would hold the contract unconstitutional. In discussing this doctrine, Mr. White first demolishes various theories. The theory of Professor Thayer, developed in 4 HARVARD LAW REVIEW, 311, —justifying the rule as a rule of practice in federal courts, to protect suitors from local prejudice,—he handles roughly. In such a theory he finds no excuse for the federal courts in "foisting a law of their own construction upon a sovereign state." It may be remarked that this is an unduly strong statement of the effect of the case. The courts of the United States do not foist a law of their own construction; they adopt a construction of the state courts, though it is no longer the prevailing construction. To prevent injustice, they are not acting in a

wholly preposterous manner in refusing under all circumstances to follow the vagaries of the state courts. So much is apparent from the most cursory reading of the facts of the case in question.

Mr. White then proceeds to analyze the opinion of the majority of the court, and finds in it an unambiguous statement that the decision of the state court, overruling prior decisions and holding unconstitutional the law under which the contract was made, was a law impairing the obligation of contracts. The statement which he relies on, however, does not appear so plain as he finds it. And the different interpretation of it by Mr. Justice Miller in his dissenting opinion is not too lightly to be ignored. A member of the court who took part in the discussions of the case was in quite as good a position to know what was actually decided as is a commentator of the present day. And when the court has repeatedly held that a case of the sort under discussion, coming up on appeal from the highest court of a state, presents no federal question, one may be pardoned for hesitating before he adopts the writer's conclusion that a federal question was decided in the case now under consideration.

The supposed decision that a judgment of a state court, holding a law unconstitutional, may itself be a law impairing the obligation of contracts, Mr. White then justifies in a most ingenious manner. He shows that the power to declare legislative acts of the colonies invalid was formerly held by the king in council; that this power was legislative, and, so far as it belonged to the federal government, it was at one time intended to be intrusted to congress; and that although finally given to the courts it has always remained a legislative power. [But no inference can be drawn from the power exercised by the king in council; he had judicial as well as legislative power.] This reasoning, moreover, is based upon a total misconception of our systems of constitutional law. A court in considering the constitutionality of a legislative act does not properly assume the attitude of a revising legislative body, weighing the pros and cons, and deciding for itself upon the propriety of the act in question. The court takes a strictly judicial position, looking to all the possible motives of the legislature, and holding no law invalid which can, within the limits of the constitution, be regarded as an expression of a possible political opinion as opposed to an arbitrary whim. In so doing, the court performs not a legislative but a judicial function.

J. G. P.

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FORMS OF PLEADING. By Austin Abbott. Completed for publication after his decease by Carlos C. Alden. Vol. II. New York: Baker, Voorhis & Co. 1899. pp. xxxix, 805 - 1858.

Twenty years and more New York has used Mr. Abbott's books as standards. One revision was not enough, nor yet a second, and last year appeared the first volume of something more than a revision, — not a collection of "General Forms of Practice," as were the others, but a work devoted to pleadings alone. Its thoroughness has caused the practitioners of New York to take considerable interest in the somewhat delayed second volume. The work, as its name indicates, consists chiefly of forms. However, few lawyers of established standing stick slavishly to such precedents, and the book is likely to prove most valuable for its authorities. At first glance the citations may seem too scant to justify this assertion. But it must be remembered that two large volumes are



devoted to a narrow field,—complaints, demurrers, and answers; that nearly every page shows some authority; that extensive notes appear at intervals. For the ground covered, these books gather, assort, and index a mass of authority both complete and accessible. The work is typical of the specializing tendency of the age, and perhaps it has the fault, natural where much space is devoted to a small subject, of being at times diffuse. It has also, however, the merit of treating its subject fully and exhaustively. Books like these are not interesting nor even profitable reading. Filled as they are with dried frames to which the lawyer must add flesh and life, they permit little display of the essentially human faculty of connected reasoning. They are the tools of the lawyer's handicraft, and their existence must be justified by their practical utility. Of its kind, this work seems well done, and likely to prove a credit to its author.

G. B. H.

**HANDBOOK ON THE LAW OF NEGLIGENCE.** By Morton Barrows. St. Paul, Minn.: West Publishing Co. 1900. pp. xii, 634.

As a result of the great increase of litigation over questions of negligence in the last decade,—says the author in his preface,—two tendencies may be noted,—toward the taking of increased precautions by property owners and employers of labor on the one hand, and the more exact enunciation of the involved law by the courts on the other. And to give a concise statement of the settled law on the subject, and the grounds of the conflicting decisions where the law is in dispute, are stated to be the aims of this book, the latest addition to the Hornbook Series. An introductory chapter treats of the fundamental principles of the law of negligence, and contains an admirable brief discussion of the doctrine of proximate cause. In the chapter treating of dangerous instrumentalities, it is stated that one who keeps a dangerous explosive is under a duty of care commensurate with the danger, and hence negligence may be predicated upon the quantity without regard to the manner in which it is protected. To say that an absolute liability is imposed, where the location is such as to cause reasonable fear to those living in the vicinity, would seem to be a better doctrine. See 13 HARVARD LAW REVIEW, 310. It is to be regretted that to the present jumble of theories as to degrees of care, the author adds still another view. Taking the classification of Wharton as a basis,—“slight” care required of the average man, and “ordinary” care required of an expert,—he adds a third class,—“great” care required of a common carrier of passengers. In justification we are told that the decisions of the courts have raised the degree of care and skill demanded of such carriers to a standard higher than that of an expert. Granting the truth of this assertion, and the theoretical accuracy of such a classification, it would seem nevertheless to work for simplicity to say that, although the amount of care requisite may vary with each particular instance, there are no degrees of care, due care under all the circumstances answering every case. Nor does the author himself maintain his position with consistency; for in the later pages of the book the term “ordinary” care is frequently used in the colloquial sense, and there are such statements as the following: “The degree of diligence requisite to constitute ordinary care”—in dealing with firearms—“is proportionate to the danger to be apprehended.” This is but another way of stating the more simple rule. Although open to occasional criticisms, however, the book as a whole is an excellent

one. It contains a clear and accurate statement of the existing law, and a full marshalling of authorities. The method of printing the propositions of law in more prominent type than the discussions that follow gives them an added emphasis that is of much help to the student. In every way, this work is fully up to the standard of usefulness set by the previous volumes of the Hornbook Series.

E. S. T.

CIVIL PROCEDURE AT COMMON LAW. By Alexander Martin. Boston. The Boston Book Company. 1899. pp. xxxii, 416.

In the early days of code pleading it was erroneously concluded that the new system had done away with the necessity of any knowledge of the old common law procedure, but with a clearer insight into the real nature of the subject it was soon perceived that a thorough understanding of the new system was impossible without at least some acquaintance with its predecessor. As Professor Martin states in his preface, "authors on code procedure in the United States usually advise students commencing its study to first familiarize themselves with the principles of common-law procedure." For this purpose the present work is admirably adapted. The book has been prepared for students, but the practitioner may often find its assistance of value. Some knowledge of the old forms of procedure is essential to an intelligent reading of cases in any subject, and the intending student could make no better preparation for work under the case system than a careful study of this book. In the fourteen chapters of his treatise Professor Martin carries the reader through the entire progress of an action at law. The fundamental principles involved are clearly stated, and some of the more interesting questions in dispute are briefly alluded to, but no attempt is made to go into any lengthy discussion or determination of them. The work, indeed, is more of a compilation than an original treatise, but thoroughly accurate and systematic. The historical part of the subject is particularly well covered. A noteworthy chapter is the one entitled "Ancient Real Actions," containing a concise account of those obsolete methods of procedure. In the main, the author's conclusions as to the substantive law necessarily included in his subject are sufficiently sound, though exception might be taken to some of his definitions, *e. g.* of conversion in trover. Trespass *ab initio* is very inadequately explained, and is not even mentioned in the index. On the other hand, particularly commendable are his discussions of the origin of detinue, and of the nature of debt. In the appendix are a full collection of writs, declarations, etc., and an excellent discussion of General Assumpsit for Part Performance.

N. B. B.

We have also received:

WIT AND HUMOR OF THE BENCH AND BAR. By Marshall Brown. Chicago: T. H. Flood & Co. 1899. pp. xv, 578. This is an entertaining book. The best sayings of a very large number of well-known members of the bench and bar at home and abroad are here collected. Short sketches of many of the more prominent are given, — merely a few lines in most cases, but so skilfully arranged in connection with the anecdotes as to convey a distinct though partial idea of the subject's personality. The book is furnished with a thorough index of subjects and of authors. The typography and general arrangement leave nothing to be desired.



REPORT OF THE FIRST ANNUAL MEETING OF THE NORTH CAROLINA BAR ASSOCIATION, held at Atlantic Hotel, Morehead City, N. C., July 5th, 6th and 7th, 1899. Edited by J. Crawford Biggs, Secretary. Durham, N. C.: The Seeman Printery. 1899. pp. 150.

PROCEDURE OF THE CIVIL COURTS IN BRITISH INDIA. Vol. I. By Hukm Chand. Bombay: The Bombay Education Society's Steam Press. 1899. pp. xiv, 835. *Review will follow.*

GENERAL DIGEST AMERICAN AND ENGLISH. Quarterly Advance Sheets. No. 13, October, 1899. Rochester, N. Y.: The Lawyers' Co-operative Publishing Co. 1899. pp. 990.

BULLETIN OF THE UNIVERSITY OF WISCONSIN, No. 31. English Common Law in the Early American Colonies. By Paul Samuel Reinsch. Madison, Wisconsin. 1899. pp. 64.

A TREATISE ON THE LAW OF DOMESTIC RELATIONS. By W. C. Rodgers. Chicago: T. H. Flood & Co. 1899. pp. cxxxiii, 900. *Review will follow.*

THE LAW OF ANIMALS. By John H. Ingham. Philadelphia: T. & J. W. Johnson & Co. 1900. pp. xiii, 800. *Review will follow.*





# HARVARD LAW REVIEW.

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VOL. XIII.

MARCH, 1900.

No. 7

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## CLASSIFICATION OF RIGHTS AND WRONGS.

MORE than twelve years ago, the writer published in this REVIEW,<sup>1</sup> by way of introduction to a series of articles on equity jurisdiction, a classification of those rights which it is the duty of courts of justice to protect and enforce, and also of the wrongs by which such rights may be infringed. The views then stated, having only recently been adopted by the writer, were comparatively crude and undeveloped. Since that date, however, he has given considerable attention to the classification of rights and wrongs, and has made his views upon that subject the basis of an elementary course of instruction on equity jurisdiction; and the result has been that his views of twelve years ago have undergone some modification and much development. It has occurred to him, therefore, that a re-statement of the views now held by him might not be out of place, especially as some of his former pupils, now engaged in teaching, have done him the honor to make some use of his former observations in their own teaching.

As those rights which it is the duty of courts of justice to protect and enforce include equitable as well as legal rights, and as each of these classes of rights requires separate treatment, it will be convenient to begin with legal rights.

Legal rights are either absolute or relative. An absolute right

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<sup>1</sup> Vol. I, p. 55.

is one which does not imply any correlative obligation or duty. A relative right is one which does imply a correlative obligation or duty.<sup>1</sup>

Absolute rights are either personal rights or rights of property. A personal right is one which belongs to every natural person as such. A right of property is one which consists of ownership or dominion (*dominium*).

Every personal right is born with the person to whom it belongs, and dies with him. Personal rights, therefore, can neither be acquired nor parted with, and hence they are never the subjects of commerce, nor have they any pecuniary value. For the same reasons, courts of justice never have occasion to take cognizance of them except when complaints are made of their infringement; and even then the only question of law that can be raised respecting them is whether or not they have been infringed. It follows, therefore, that all the knowledge that we have of personal rights relates to the one question, what acts will constitute an infringement of them. We can neither number them nor define them, and any attempt to do either will be profitless. There is, however, one personal right which differs so widely from most others that it deserves to be mentioned, namely, the equal right of all persons to use public highways, navigable waters, and the high seas.

In all the foregoing particulars, rights of property are the very converse of personal rights. All such rights are acquired, and they may all be alienated. They are all, therefore, the subjects of commerce, and they all have, or are supposed to have, a pecuniary value. For the same reasons, courts of justice take cognizance of them for a great variety of purposes, and they are all capable of being enumerated and defined.

Rights of property are said to be either corporeal or incorporeal. In truth, however, all rights are incorporeal; and what is meant is that the subjects of rights of property (*i. e.*, things owned) are either corporeal or incorporeal. A thing owned is corporeal when it consists of some portion of the material world, and incorporeal when it does not.

A single material thing may be owned by several persons, and

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<sup>1</sup> Writers upon jurisprudence generally use the terms *in rem* and *in personam* to mark the primary division of legal rights, and it is, therefore, proper for me to explain why I use the terms "absolute" and "relative" instead. It will, however, be more convenient to do this after treating of the different classes of legal rights. See *infra*, p. 246, n.



that too without any division of it, either actual or supposed, each person owning an undivided share of it; and in that case each owner has a right of property just as absolute as if he were the sole owner of the thing. In case of land also, the ownership, instead of being divided into shares, may be divided among several persons in respect to the time of their enjoyment, one of them having the right of immediate enjoyment, and the others having respectively successive rights of future enjoyment. This peculiarity in the ownership of land comes from the feudal system. Land itself is also peculiar in this, namely, that a physical division of it among different owners is impossible; and hence the land of A, for example, is separated from the adjoining land only by a mathematical line described upon the surface, A's ownership extending to the centre of the earth in one direction, and indefinitely in the other direction. By our law, land is also capable of an imaginary division, for the purposes of ownership, laterally as well as vertically; for one person may own the surface of the land, and another may own all the minerals which the land contains. Such a mode of dividing the ownership of land certainly creates many legal difficulties, but it seems to be persisted in notwithstanding, at least in England.<sup>1</sup> In like manner, by our law, a building is capable of an imaginary division, for purposes of ownership, both lateral and vertical.<sup>2</sup>

Relative rights are either obligations or duties. Strictly, indeed, "obligation" or "duty" is the name of the thing with which a relative right correlates; but such is the poverty of language that we have to use the same word also to express the right itself.

An obligation is either personal or real, according as the obligor is a person or a thing. An obligation may be imposed upon a person either by his own act, *i. e.*, by contract (*obligatio ex contractu*), or by act of law (*obligatio ex lege*, or *obligatio quasi ex contractu*).

An obligation may be imposed upon a thing either by the law alone, or by the law acting concurrently with the will of the owner of the thing. In the latter case, the will of the owner must be manifested in such manner as the law requires or sanctions. By our law, it is sometimes sufficient for the owner of a thing to impose an obligation upon himself, the law treating that as sufficient evidence of an intention to impose it upon the thing also, — when, for example, the owner of land enters into a covenant respecting

<sup>1</sup> *Humphries v. Brogden*, 12 Q. B. 739, 755.

<sup>2</sup> *Idem*, 756-757.

it, and the covenant is said to run with the land. The most common way, however, in which an owner of land manifests his will to impose an obligation upon it is by making a grant to the intended obligee of the right against the land which he wishes to confer, *i. e.*, he adopts the same form as when he wishes to transfer the title to the land. If, however, an owner of land, upon transferring the title to it, wishes to impose upon it an obligation in his own favor, he does this by means of a reservation, *i. e.*, by inserting in the instrument of transfer a clause by which he reserves to himself the right which he wishes to retain against the land. An owner of a movable thing imposes an obligation upon it by delivering the possession of it to the intended obligee, declaring the purpose for which he does it, as when a debtor delivers securities to his creditor by way of pledge to secure the payment of the debt.

A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist,<sup>1</sup> but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitutes* (*i. e.*, states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, *i. e.*, the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *à prendre*. The latter included the *pignus* and the *hypotheca*, *i. e.*, the Roman mortgage, — which was called *pignus* when the thing mortgaged was delivered to the creditor, and *hypotheca* when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner. Originally, possession by the creditor of the thing mort-

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<sup>1</sup> See 10 HARV. LAW REV. 72.



gaged was indispensable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the parties (conventional hypothecations), and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

The *pignus* has passed into our law under the name of pawn, or pledge, as to things movable, but has been wholly rejected as to land. The conventional *hypotheca* has been wholly rejected by our common law, though it has passed into our admiralty law. The legal or tacit hypothecation, on the other hand, has been admitted into our common law to some extent, though under the name of lien (a word which has the same meaning and the same derivation as "obligation"). Thus, by the early statute of 13 E. I. c. 18, a judgment and a recognizance (the latter being an acknowledgment of a debt in a court of record, of which acknowledgment a record is made) are a general lien on all the land of the judgment debtor and recognizor respectively, whether then owned by them or afterwards acquired. So also, in many cases, the law gives to a creditor a similar lien on the debtor's movable property, already in the creditor's possession when the debt accrues, though, in respect to the creditor's possession, this lien has the features of a *pignus* rather than of a *hypotheca*.

There are also in our law other instances of what the Romans would have called personal servitudes, if they had existed in their law; for example, easements and profits in gross,<sup>1</sup> *i. e.*, easements and profits which exist for the benefit of their owner generally, — not for the exclusive benefit of some particular estate belonging to him. Rents and tithes seem also to fall into the same category.<sup>2</sup>

Passing from obligations to duties, the first thing to be observed is that the latter are either public or private, according as they are imposed for the benefit of individuals as such, or for the benefit of the public, or of some portion of the public.

Duties have attracted very little notice either from courts or from legal writers. There has, indeed, been a general failure, as well in our law as in the Roman law,<sup>3</sup> and also among writers on jurisprudence,<sup>4</sup> to discriminate between obligations and duties; and yet the distinctions between them are many and important. All duties originate in commands of the State; while all obligations originate either in a contract between the parties, or in something which has been done or has happened to the gain of the one and the loss of the other, and under such circumstances as make it unjust for the one to retain the gain or the other to suffer the loss. It is true that every obligation (being a *vinculum juris*) has in it a legal element, and that those obligations which do not originate in contract are pure creatures of the law: yet, in creating obligations, the only object of the State is to see that all persons within its jurisdiction act justly towards others, while, in imposing duties, it acts from motives of policy, or at least it imposes them as a part of the system of law which it adopts, and without reference to any particular case or any particular persons. Moreover, in creating obligations, the State acts in each particular case, and only after the events have happened which render its action necessary, and in each case its action has reference solely to the parties between whom the obligation is created, while, in imposing duties, the State issues its command once for all, and

<sup>1</sup> See Gale on Easements, Part I, c. 1, s. 4 (Part I, c. 2, s. 4 of the 6th and 7th eds.).

<sup>2</sup> See 10 HARV. LAW REV. 78 *et seq.*

<sup>3</sup> Thus, in Justinian's Institutes, L. 3, Tit. 27, six instances are given of what are called *obligationes quasi ex contractu* (namely, *negotiorum gestorum*, *tutela*, *communi dividundo*, *familia erciscunda*, *ex testamento*, *solutio non debiti*), only the first and last of which seem in truth to belong to that category, the other four being instances of duties.

<sup>4</sup> See Holland, Jurisprudence, Part 2, c. 12, in which obligations are declared to embrace all rights *in personam* (*i. e.*, all relative rights), and in which obligations and duties are treated of indiscriminately.



the command always precedes the duty. In creating obligations, the State acts generally through its courts of justice, while, in imposing duties, it acts directly or indirectly through its legislature, *i. e.*, duties are imposed by positive laws. In short, the necessity for creating an obligation is established by *a posteriori* reasoning, while the necessity for imposing a duty is established by *a priori* reasoning. To an obligation there must always be two parties or sets of parties, and neither of them can ever be changed except by authority of law. Of duties, on the other hand, parties cannot properly be predicated, as duties are imposed, not upon identified persons, but upon persons in certain situations, or occupying certain positions, and they are imposed also in favor of persons in certain situations, or occupying certain positions, and, therefore, the person who is to perform a given duty, as well as the person in whose favor it is to be performed, is liable to constant change.

The cases in which duties are imposed, especially by modern statutes, are numberless, and any attempt to enumerate or classify them would be futile.<sup>1</sup> There are, however, many duties, most of which are imposed by ancient statutes, or by rules of the common law or the canon law which have the force of statutes, — which are well known, and some of which it may be well to mention. Probably the most ancient instance to be found is the duty imposed upon an executor to pay legacies. It was originally imposed by the Roman law upon the predecessor of our executor, namely, the heir appointed by the will of a deceased person; but when the Roman empire became Christian, and the Church at

<sup>1</sup> In *Couch v. Steel*, 3 El. & Bl. 402, it was held that the statute of 7 & 8 Vict. c. 112, s. 18, makes it the duty of a ship-owner to keep on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages; that the duty is both public and private; that for a breach of that duty the only remedy of the public was the penalty provided by the Act, the common-law remedy by indictment being by implication taken away; but that a seaman, serving on board a ship at the time of the breach, was entitled to the common-law remedy of an action on the case, notwithstanding the penalty.

By The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), after a railway company has given to a land-owner a notice that it will require his land for the purposes of its line, in accordance with s. 18 of the Act, the duty is imposed upon the company of taking the proceedings provided for by the Act for acquiring the land and paying the purchase-money. See *Haynes v. Haynes*, 1 Dr. & Sm. 426, and cases there cited.

The decision in the celebrated case of *Ashby v. White*, 2 Ld. Raym. 938, 1 Smith's L. C. (2d ed.) 105, involved two propositions, namely, first, that the plaintiff, being a burgess of the borough of Aylesbury, was entitled as such to vote for two burgesses to represent that borough in the House of Commons; secondly, that the duty was imposed upon the defendants, at an election held for electing such burgesses, of receiving and counting the votes of the electors, and that for a breach of that duty the plaintiff was entitled to maintain an action on the case.

length obtained exclusive jurisdiction over the estates of deceased persons, it was by a law of the Church that the duty was imposed. This duty constitutes the only legal means of compelling an executor to pay legacies, as the assets out of which they are to be paid vest in him absolutely, both at law and in equity. A closely analogous duty is that imposed by the Statute of Distributions<sup>1</sup> upon administrators of the estates of intestates to divide the estate among the intestate's next of kin. Another ancient duty (which, however, no longer exists in English-speaking countries) was the duty imposed by the canon law upon every tithe-payer to set out the tithes payable by him, *i. e.*, to sever the tenth part from the other nine parts, and to set apart the former for the tithe-owner. It was by means of this duty alone that payment of tithes could be enforced; for, until tithes were set out, the title to the entire produce of the land was vested in the tithe-payer, but, when the tithes were set out, the title to the tenth part vested in the tithe-owner, who had accordingly, in respect to it, the same common-law remedies as any other owner of chattels. Another ancient instance is the duty imposed by the common law upon the heir of a deceased person to assign dower to the widow of the latter. Here, again, the enforcement of this duty was the widow's only resource, as the title to all the land of which her husband died seized vested in the heir, both at law and in equity. Another very numerous class of duties consists of those which are imposed upon all persons who travel upon public highways, or upon navigable waters (including the high seas), with respect to other persons with whom they come in contact. It is upon these duties that the rights of such persons as against each other wholly depend. Other instances will be found in the well-known duties imposed by the common law upon common carriers and innkeepers, not only towards the employers of the one and the guests of the other, but also towards all those who desire to employ the one or to become the guests of the other; also in the duty imposed by the common law upon professional men, and upon others whose callings require the exercise of special skill, to exercise reasonable skill on behalf of all those by or for whom they are employed. In the cases mentioned in the last sentence, there may, indeed, be a liability on contract; but, on the other hand, in many of those cases there may either be no contract, or none that can be proved, while the duty is always available, and never involves any difficulty as to proof.

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<sup>1</sup> 22 & 23 Car. II. c. 10.



Domestic or family relations give rise to a numerous class of duties, but most of them are moral rather than legal, or, at all events, are not such as any court of justice will enforce, and do not, therefore, come within the scope of this article.

Another very numerous and important class of cases consists of those in which duties are imposed upon joint-stock corporations towards their shareholders, and also towards those who establish a right to become holders of their shares. As a rule, these duties furnish the only means by which these two classes of persons can enforce their rights against the corporation. There may be exceptions to this rule, and one exception certainly is where a dividend has been declared (and the declaration of a dividend is the performance of a duty); for then the amount payable to each shareholder becomes a debt, and so, of course, an obligation.

The class of cases, however, in which an alleged breach of duty becomes more frequently the subject of litigation than in all other cases put together, is that in which the duty imposed is to exercise care and diligence to secure the safety of others, or to avoid being the cause of personal harm to others. Such a duty is imposed upon all persons to whom the personal safety of others is largely intrusted, and especially upon all carriers of passengers. A similar duty is also imposed upon all persons whose occupation involves special danger to the public, for example, upon railway companies, or who do or permit to be done, or keep or permit to be kept, upon their own land, what is fraught with a like danger. A breach of this duty is negligence, and whether such breach has been committed is the question to be tried in what is by far the most numerous class of litigated cases with which courts of justice are troubled. Negligence may, indeed, be a breach of contract, and it may also be one of the elements of an affirmative tort, namely, where one person by an affirmative act unintentionally causes harm to another, but might have avoided doing so by the exercise of reasonable care. It would not, however, be too much to say that, in ninety-nine out of every hundred of the reported cases involving a question of negligence, the alleged negligence was a breach of duty.

We are now prepared to inquire why it is that duties have attracted so little attention. Some of the reasons certainly are not far to seek. In several particulars, duties bear a striking resemblance to personal rights. The latter are pure creatures of the law, and are not in the least dependent upon the will or the action of the person to whom they belong. The former also are pure creatures

of the law, and are not directly (though they may be indirectly) dependent upon the will or the action either of the person upon whom the burden of them is imposed, or of the person entitled to have them performed. Personal rights accompany their owner from his birth to his death; and while that is not true of duties, yet it is true of every duty that it is a mere legal incident of certain situations, that a person can avoid incurring liability to a duty only by avoiding the situation to which such liability is incident (as he can free himself from a duty, to which he has once incurred liability, only by ceasing to occupy the situation to which such liability is incident); and that a person can acquire a right to the performance of a duty only by placing himself in a situation to which such right is incident, and will lose the right whenever he ceases to occupy that situation. A personal right can neither be bought, nor sold, nor be the subject of commerce, nor have any pecuniary value; and so also the right to have a duty performed can neither be bought, nor sold, nor be the subject of commerce, nor have any pecuniary value, except indirectly, as stated above. As courts of justice can have no occasion to take cognizance of personal rights, except when complaints are made of their infringement, so also the same thing is true of duties; and though a duty, unlike a personal right, may be easily formulated, and the question of its existence is entirely distinct from the question of its infringement, yet the former, in comparison with the latter, very seldom arises, and, even when it does arise, there is little in it to stimulate inquiry beyond the mere practical question whether the person charged was bound to do the thing the not doing of which is the alleged cause of action. If an explanation be asked of the comparative infrequency with which any question as to the existence of a duty arises, it may be answered that a duty once existing continues to exist so long as the statute which imposed it remains in force, or so long as the situation which gave rise to it continues to exist; and that, while an obligation as a rule is capable of but one performance and one breach, and, therefore, when once performed or once broken, is at an end, the same duty may be imposed upon an unlimited number of persons, and may be performed an unlimited number of times, and hence is capable of an unlimited number of breaches.<sup>1</sup>

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<sup>1</sup> I now proceed to do what, in a previous note (p. 938, n.), I postponed until now, namely, to explain why I used the terms "absolute" and "relative" to mark the primary division of legal rights, instead of the terms *in rem* and *in personam*. 1. If I had used the latter terms, I should have required them both to designate relative



Having now gone through with the different classes of legal rights, it is next to be observed that a relative right is relative only as between the person to whom the right belongs and the person who is subject to the correlative obligation or duty; and, therefore, so far as such a right concerns the rest of the world, it is an absolute right of the second class, *i.e.*, a property right. Moreover, every relative right which has, or is supposed to have, a pecuniary value, does or may concern the rest of the world. What relative rights then have, or are supposed to have, a pecuniary value? Clearly, all obligations fall within that category; and though in strictness this cannot be said of any duty, yet some duties consist, in whole or in part, in transferring money, or other things of value, to other persons, and when that is the case, and especially when the duty furnishes the only legal means of compelling such transfer, the performance of the duty certainly confers a pecuniary benefit upon the person in whose favor it is performed, and yet, prior to its performance, the only legal right vested in the latter is the right to have the duty performed. Of this description is the duty of an executor to pay legacies, of the administrator of an intestate to divide the personal estate of the latter among his next of kin, and of a tithe-payer to set out tithes.

Probably many persons will be surprised at being told that the legatees and next of kin of deceased persons have no right or interest in the estates out of which their legacies and distributive shares are respectively to be paid. Their surprise ought, however, to cease when they are further told that, by the Roman law, no

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rights, and should, therefore, have had nothing left for absolute rights; for rights *in personam* would clearly have embraced only those rights which are created by personal obligations and duties, and, therefore, I must have used the term *in rem* to designate those created by real obligations. 2. If the phrase "rights *in personam*" perfectly describes all those rights which are created by personal obligations or duties, then the phrase "rights *in rem*" perfectly describes those rights which are created by real obligations, when considered as obligations; and, if so, it is clearly impossible that it should also correctly describe absolute rights. 3. The phrase "rights *in rem*" does not, in fact, describe correctly either class of absolute rights. It might, indeed, be used, without any great impropriety, to describe ownership of corporeal things, but to use it to describe ownership of incorporeal things is certainly taking great liberties with language, and to use it to describe personal rights seems to me to be in the highest degree absurd. 4. The terms *in rem* and *in personam* are properly applicable to procedure only, and the use of them was limited to procedure by the Romans. 5. The terms "absolute" and "relative," as used by me, require neither explanation nor justification, while the terms *in rem* and *in personam*, if used for the same purpose, would have required both. 6. The terms *in rem* and *in personam*, as applied to rights, are wholly foreign, while, in using the terms "absolute" and "relative" instead, I follow the example of Blackstone.

one could directly dispose of any part of his estate by will; that when a person died, whether testate or intestate, his entire estate vested absolutely and by operation of law in his heir, namely, in his *hæres natus* if he died intestate, and in his *hæres factus* if he died testate; that property could be given by will only in the form of legacies, and that legacies could be given only indirectly, namely, by directing the heir to pay them; and, lastly, that our executor and administrator have respectively succeeded, as to personal estate, to the situation of the *hæres factus* and *hæres natus* of the Romans. Hence it is that, while the real estate of a deceased person passes, upon his death, directly to his heir, no one can acquire any interest in his personal estate except through his executor or administrator, *i. e.*, through the performance of a duty imposed upon the latter.

It follows from what has been said that all obligations, whether personal or real, and also such duties as have just been described, have two aspects, *i. e.*, they are to be regarded as relative rights, or as absolute rights, according to the point of view from which they are looked at, but with this difference, that, while personal obligations and duties are chiefly to be regarded as relative rights, real obligations are chiefly to be regarded as absolute rights.

It is now necessary to return to the subject of incorporeal things which may be owned, — of which it has thus far only been said that they constitute no part of the material world, and that is no more than saying that they are incorporeal.

Ownership of corporeal things is merely the result of appropriation by individuals to themselves, with the sanction of the law, of portions of the material world; *i. e.*, all material things exist in nature, though their form and appearance may be indefinitely changed, and their value in consequence indefinitely increased or diminished. All that can be done, therefore, respecting them by human will or human action, is to change their form and appearance, and to make them the subjects of individual ownership. Those incorporeal things, however, which may be owned, have no existence in nature, and are all, therefore, of human creation. Moreover, they are all created either by the State alone, or by private persons with the authority of the State. A private person can create incorporeal ownership either against himself or against things belonging to him. He does the former whenever he incurs a personal obligation, *i. e.*, he creates in the obligee a relative right as between the latter and himself, and an absolute right as between the obligee and the rest of the world. So, too, a private person



creates an absolute right against himself when he grants an annuity, and in that case there is no relative right. A private person creates an incorporeal property right against a thing whenever he creates a real obligation, *i. e.*, imposes an obligation upon a thing belonging to him; for, though the right thus created is relative as between the obligee and the thing upon which the obligation is imposed, yet it is also absolute, not only as to all persons other than the owner of the thing, but even as to him. In case of some duties, also, a private person may contribute to the creation of incorporeal ownership, not against himself personally, nor against things belonging to him, but against another person, though in respect of things belonging to himself, as when a testator directs his executor to pay legacies to certain persons out of his personal estate, or to sell certain land and pay the proceeds to persons named, the land not being devised to the executor, but left to descend to the testator's heir; for in each of these cases the law makes it the duty of the executor to do as the testator has directed, and this duty the beneficiaries can compel him to perform; and this right in the beneficiaries is incorporeal property.

Another important class of cases in which a private person may create incorporeal ownership, is where an owner of things grants to another person an authority to transfer the title to them, or to use and enjoy them. In the first of these cases, the authority is technically called a power, and the acts authorized to be done would, without such authority, be inoperative and void. In the second case, the authority is commonly called a license, and the acts authorized to be done would, without such authority, be tortious. The grantor of a power may limit the persons in whose favor it may be exercised (not including the grantee), or he may authorize its exercise for the grantee's own benefit. In the former case, the grantee of the power is not entitled to receive any pecuniary benefit from its exercise, while, in the latter case, the power is practically equal to ownership of the things over which it extends. In point of law, however, it is, in each case, incorporeal property, *i. e.*, it is no less than that in the first case, and no more in the second. In the first case, the exercise of the power may be discretionary or mandatory, and, if mandatory, its exercise will be a duty.

A license is commonly granted for the benefit of the licensee, and in that case the right granted differs practically from ownership only in being less extensive. It may, indeed, differ practically from ownership only in not being exclusive; but a grant by

the owner of a thing of all his rights as such owner will be a grant of the ownership itself, though in terms a license only be granted. A good illustration of a license will be found in the grant of a right to work a patent for a new invention, neither the patent itself, nor any part of it, being granted. This is an instance, moreover, of a license in which the thing to be enjoyed, as well as the right to use and enjoy it, constitutes incorporeal property. Another good illustration will be found in a grant by an owner of land of the right to dig in his land for minerals, and to appropriate to the grantee's own use all the minerals dug and carried away by him. Care must be taken, however, not to confound this case with that of a grant by an owner of land of all the minerals under the land, the latter being, as has been seen, a grant of corporeal property.<sup>1</sup>

Another instance of incorporeal ownership created by private persons is where a right is created which depends upon the happening of a condition. Thus, if A incur an obligation to B to pay him \$100 on the happening of some uncertain event, the obligation does not come into existence until the event happens, and yet B has a fixed right to be paid \$100 by A in case the event happens. So, if A give B a legacy of \$100 in the event of B's attaining the age of twenty-one years, the gift will not take effect during B's infancy, but yet he will have a fixed right to have the legacy paid to him by A's executor, in case he attains the age of twenty-one years. So, if A give land to B, but declare that, if B die without issue then living, the land shall go to C, C will have nothing in the land during B's life, but yet he will have a fixed right, by virtue of which the ownership of the land will vest in him on the happening of the event named,

There is still another kind of incorporeal property, created by private persons, which is very different from any hitherto mentioned, namely, the property which an author, musical composer, or artist has in his literary, musical, or artistic creations. This is not a right conferred upon one person by another against himself, or against things belonging to him; nor is it a right against any person or any thing, nor is it dependent upon any person or any thing; but it is property which has a more independent existence than any corporeal thing whatever, — which a person, by his own intellectual labor, creates in himself out of nothing. It consists, not in the ideas expressed (which cannot be the subject of owner-

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<sup>1</sup> See *supra*, p. 539.



ship), but in the expression of them, *i. e.*, in the case of an author or musical composer, it consists in the selection and arrangement of the words and signs by which the ideas are expressed, — in the case of an artist, it consists in what the artist embodies in his picture or statue.

It is, however, those classes of incorporeal property which are created by the State that attract the most attention. Blackstone<sup>1</sup> enumerates five of these, namely, advowsons; tithes, offices, dignities, and franchises. 1. An advowson is the right conferred by the State upon a person who has founded and endowed a church, and upon his heirs and assigns forever, of appointing the priest who is to officiate in that church. Though this right has no existence in this country, it is a very important right in England, as most of the parish churches in that country were originally founded and endowed by the lords of the manors in which they are respectively situated; and hence it is that the parson of a parish is there generally selected, not by the parishioners, but by the lord of the manor. 2. "Tithes" mean either the things received under that name, or the right to receive them, and that right is created by the State, and is incorporeal property. Like other property rights, it may be temporary or perpetual. Presumably all the tithes payable in any parish are payable to the parson of the parish for the time being, and they ought always to be payable to, or for the benefit of, either the parson of the parish, or other persons holding spiritual offices, and, if they had been, they would never have made an important figure as a species of incorporeal property. By an abuse, however, they were permitted to be alienated in fee simple, and vested in laymen; and hence they became subject to all the usual incidents of private property. 3. Most offices are not only created by the State, but the right to hold them, as well as the tenure of them, is regulated by law; and, therefore, though they are in their nature incorporeal property, yet they are without some of the most usual and important incidents of property, as they can neither be bought nor sold. They are also usually held, especially in this country, only for short periods. There is seldom, therefore, a serious controversy as to the title to an office, unless it be elective; and even then the only question which can often arise is, whether a person claiming it has been elected to it. Regarded as property, an office is peculiar in this, namely, that all the emoluments which are incident to it are conferred as a compensation for

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<sup>1</sup> 2 Bl. Com. 21.

duties to be performed, and that no one can become entitled to receive the one without becoming bound to perform the other. The duties which the holder of an office is bound to perform may, of course, become the subject of controversy; and so, though less frequently, may the emoluments to which he is entitled. 4. When dignities exist in a State, and are held by a legal title, they also constitute a species of incorporeal property; but their existence in a State implies that the people of that State are, to some extent, ranked and graded by law; and, as that is not the case in this country, it follows that dignities have no legal existence here. 5. A franchise is defined by Blackstone<sup>1</sup> to be a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject, *i. e.*, by virtue of the king's grant, or by virtue of an enjoyment so long continued as to be in law equivalent to a grant. It is only in exceptional cases that the king's prerogative can thus be vested in a private person, and the fact that it can be done in those cases calls for some explanation. The explanation seems to be that certain prerogatives are vested in the king merely for the benefit of the general public. For example, the convenience of the public requires that certain services should be performed for the benefit of all persons who require their performance, and who are able and willing to pay for it; and the problem is to secure the efficient performance of such services for a fixed and reasonable compensation. One way of doing this is for the government itself to assume the performance of the service; while another way is for the government to delegate the performance of the service to private persons or corporations, making it the duty of the latter to perform the service efficiently in consideration of receiving a compensation, either fixed and agreed upon, or to be allowed by the government for the time being. Of course, it is assumed that the principle of competition is inapplicable to the case; for if it were applicable, there would be no problem to be solved, nor anything for the government to do. Moreover, it is further assumed that the very opposite principle is applicable, namely, that of monopoly; for the State must either not interfere at all, or it must assert absolute control, *i. e.*, it must either leave the needs of the public to be provided for by free and unlimited competition, or it must make it unlawful for any one to supply such needs except with the permission and under the authority of the State. Accordingly, when the State itself undertakes the performance of a service for

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<sup>1</sup> 2 Bl. Com. 37.



the general public, it always maintains a monopoly of such service, — for example, that of carrying the mails. When, therefore, the State delegates the performance of a public service to a private person or corporation, it ought to secure to the latter a monopoly commensurate, as nearly as possible, with the duty imposed.

It is upon these principles that most franchises exist in England at the present day. First, a monopoly of a certain public service is vested in the Crown. Then the Crown by its grant delegates the performance of such service to private persons or corporations. Grants of a right to keep a fair, a market, or a ferry, are the most conspicuous instances; and every such grant carries with it by implication the exclusive right of keeping a fair, market, or ferry (as the case may be), within the district which such fair, market, or ferry is supposed to serve.

Whatever belongs to the Crown in England of course belongs to the State in this country; and when the State delegates its power, it commonly does it, not by a grant, but by law, *i. e.*, by a statute;<sup>1</sup> and yet such delegations of the power of the State are commonly called franchises.

Even in England, a grant from the Crown has, in modern times, been found inadequate in many cases in which the power of the State is delegated. Thus, when an ancient ferry is superseded by a bridge, and it is yet thought desirable that the bridge should be built and maintained with private capital, and that the capital thus expended should be returned in tolls, a statute is found necessary. So, when the policy was successively adopted of inviting the expenditure of private capital in building and maintaining highways, canals, and railways, a statute was always indispensable, as all such enterprises involved the compulsory taking of the land of many persons. Lastly, the needs of large cities have, within recent times, introduced several species of public service which involve an interference with public streets, and hence the right to perform such services can properly be delegated only by statute.

In this country a strong disposition has been shown to delegate the power of the State, not to particular persons or corporations selected by the legislature, but to any persons who shall voluntarily organize themselves into corporations, and comply with certain prescribed conditions. This is, of course, upon the principle of granting equal rights to all; but unfortunately the recognition of that principle has been accompanied by an abandonment of all

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<sup>1</sup> But see *infra*, p. 554, as to patent rights.

attempt to protect from unjust and ruinous competition those who have invested their money irrevocably in providing means and facilities for serving the public. For example, when one set of men have built a railway from A to B, the State does nothing to prevent another set of men from building another railway between the same points, and as near to the former as they please.

When the State has vested in a corporation a right, for example, to take tolls in consideration of duties to be performed, as such corporation cannot transfer to any one else the burden of the duties which it has assumed, so it cannot transfer to any one else the right which was designed to furnish the means for discharging those duties efficiently. In other words, such a right is inalienable; and, therefore, it is established in England<sup>1</sup> that a railway company can transfer by way of mortgage only its surplus income, *i. e.*, what remains for its creditors and shareholders after payment of all its necessary expenses. Unfortunately, however, our State legislatures have lost sight of these principles, and have accordingly passed statutes authorizing railway companies to mortgage all their property and "franchises"; and hence receiverships and re-organizations of railway companies, which are entirely unknown in England, have become disastrously familiar in this country.

It has been seen that the ancient franchises of fairs, markets, and ferries, as well as many modern "statutory franchises," — for example, toll-bridges, turnpike roads, canals, and railways, — have in them an element of monopoly. There are other delegations of sovereignty, however, which are monopolies pure and simple, *i. e.*, delegations of an exclusive right to do what before was free and open to all. There are in modern times two classes of these rights, namely, patent rights and copyrights. They are peculiar, not only in the particular just stated, but also in being conferred, not in consideration of duties to be performed to the public, but in consideration of services already rendered, as well as in being conferred only for limited periods of time. A patent right is conferred by grant (in England from the Crown, in this country from the United States), though under statutory authority. A copyright is conferred directly by statute. A copyright must be sharply distinguished from the common-law right of an author, musical composer, or artist, heretofore mentioned. The latter exists only before publication, the former only after publication.

Although a copyright is in strictness of law a pure monopoly,

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<sup>1</sup> *Gardner v. London, Chatham and Dover Railway Co.*, L. R. 2 Ch. 201.



yet it ought to be regarded, not as a favor conferred, but as a partial atonement for the wrong done by the State in putting an end, upon publication, to the common-law right of an author, musical composer, or artist, in his own creation.

Having now said all that it is thought necessary to say of incorporeal things, it is next in order to inquire what rights are affirmative in their nature, and what are negative. If, however, we can ascertain what rights are negative, and why, the inquiry will be fully answered. What is a negative right? Clearly, it is a right against some person or persons, *i. e.*, a right not to have something done by him or them. By whom can such a right be given? Clearly, only by the person against whom it is given, or by some one in whose power such person is, *i. e.*, by the State. How can one person give another a negative right against himself? Only by incurring a negative personal obligation to that other. How can the State give a negative right to one person against another? It is neither easy nor necessary to specify all the possible ways in which this can be done. How does the State in fact give a negative right to one person against another? Only by giving it against all persons within the limits of its territory, or some portion of that territory, *i. e.*, by giving a monopoly or exclusive right, as already explained.

It follows, therefore, that all personal rights, all property rights, except those incorporeal rights by which the State confers a monopoly, and all relative rights, except negative personal obligations, are affirmative. If it be asked why a real obligation cannot confer a negative right against the thing bound by it, the answer is plain: as an inanimate thing is in the nature of things incapable of acting, it is impossible that a real obligation should ever consist in doing (*faciendo*); and, though it is possible that such an obligation should consist in not doing (*non faciendo*), yet an obligation not to do what the obligor by no possibility can do, is absurd and unmeaning, and therefore, in legal contemplation, cannot exist. In what, then, does a real obligation consist? Here again the answer is plain: it consists in permitting or suffering something to be done (*patiendo*).

But, though it seems so clear upon principle that there is no such thing as a negative real obligation, yet it is far less clear upon authority; for the Civilians all say there is such a thing, and, in so saying, they are supported, to some extent, by texts of the Roman law. Thus, in Justinian's Institutes,<sup>1</sup> it is said there is a

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<sup>1</sup> L. 2, Tit. 3, s. 4.

servitude, that one shall not build his house higher, lest he obstruct his neighbor's lights (*ut ne altius tollat quis ædes suas, ne luminibus vicini officiatur*). Upon this passage, however, it may be remarked, first, that what it actually expresses is a personal obligation binding the owner of the house, — not a real obligation binding the house itself; secondly, that one is tempted to say that the passage is only an inaccurate mode of stating an affirmative servitude, namely, that the servient tenement is bound to permit the light to pass over it without obstruction to the windows of the dominant tenement.

If it be asked why a duty may not be negative, as well as a personal obligation, the answer is that a person can deprive himself of the right to do a thing only by conferring upon some one else the right not to have it done, — which he can do only by incurring a negative personal obligation in favor of the latter; but when the State wishes to deprive a person of the right to do a thing, it has a much more direct and simple (and therefore a better) way of accomplishing its object than by imposing upon him a duty not to do it, — namely, by commanding him not to do it, and so making the doing of it an affirmative tort; and, as the State is never supposed to do a vain and nugatory act, nor to do circuitously what it can do directly, it follows that the State can never be supposed to impose a negative duty.

C. C. Langdell.

[To be continued.]



LORD WESTBURY.<sup>1</sup>

LORD WESTBURY once said of a distinguished contemporary that "the monotony of his character was unrelieved by a single fault." From such a characterization Westbury himself was surely exempt. With professional capacity of the highest order he combined peculiarities of mind and faults of character which marred much of his work. His career is an interesting and, it may be added, a practical study; for while his genius raised him to the heights of distinction, his faults as surely led to his humiliation.

His eminence as a lawyer was unquestioned by his bitterest enemies. Baron Parke considered him the greatest advocate at the bar; Sir George Jessel described him as a man of genius who had taken to the law. Gladstone, who had frequent occasion to learn the temper of Westbury's mind, said of him: "It was subtlety of thought, accompanied with the power of expressing the most subtle shades of thought in clear, forcible, and luminous language, which always struck me most among the gifts of Lord Westbury. In this extraordinary power he seemed to have but one rival among all the men, lawyers and non-lawyers, of his age. I may be wrong, but the two men whom, in my own mind, I bracketed together were Lord Westbury and Cardinal Newman."<sup>2</sup> It was this rare combination of thought and expression which particularly distinguished him. His power of lucid statement, which was accompanied by a rare capacity for marshalling a multitude of facts and collateral details in their logical order, arose from readi-

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<sup>1</sup> Richard Bethel was born at Bradford-on-Avon, June 30, 1800. He was educated at Wadham College, Oxford, taking his M. A. degree in 1820. Called to the bar at the Middle Temple in 1823, he took sick in 1840; entered parliament, was knighted, and became solicitor-general in 1852; attorney-general in 1856 and again in 1859. In June, 1861, he became lord chancellor, with the title of Baron Westbury of Westbury; resigned in 1865. He died July 20, 1873.

<sup>2</sup> In the parliamentary debate on the Divorce Bill, to which Gladstone was strongly opposed, Westbury remarked: "If the right honorable gentleman had lived—thank Heaven he did not—in the Middle Ages, when invention was racked to find terms of eulogium for the *subtilissimi doctores*, how great would have been his reputation!" Gladstone in his reply said: "My honorable and learned friend complimented me upon the subtlety of my understanding, and it is a compliment of which I feel the more the force since it comes from a gentleman who possesses such a plain, straightforward, John Bull-like character of mind—*rusticus, abnormis sapiens crassaque Minerva*."

ness and clearness of conception. "Clearness of expression," he said, "measures the strength or vigor of conception. If you have really grasped a thought, it is easy enough to give it utterance." His mental bent was almost wholly judicial; he convinced by appeals to sober judgment rather than to considerations of expedient or sentiment; and the elevation which he gave to the simplest discussion arose from his habit of bringing the dryest details to the test of original principles.

Westbury's most conspicuous defect was an arrogant consciousness of intellectual superiority, manifesting itself, with utter disregard for the feelings of others, in fondness for caustic wit and rather spinous humor. He was too much in the habit of what his biographer has termed thinking aloud, without regard to the effect which the expression of his thoughts might have on others. His deliberate method of setting people right provoked intense irritation; when roused by pretentiousness or humbug, his sarcasm fell with blistering effect. In fact he bids fair to be remembered by the public at large merely as the author of innumerable sharp sayings. But his indulgence in this respect seems to have been largely due to an instinctive genius for clear-cut phrases. There appears to have been none of that hardening of the heart which might have been expected in a man whose intellect so completely predominated. He is said to have displayed singular credulity in any appeal not directed to his intellect, and his goodness of heart is attested by his few intimates.<sup>1</sup> He evidently felt strong enough to stand alone, caring for neither praise nor blame. Heedless alike of misconception and antagonism, he would seem to have determined to conquer the world rather than conciliate it. It was his boast that, from his youth up, he had never truckled to any

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<sup>1</sup> Mr. Nash's admirable biography of Westbury makes it plain that his mind must have acquired its cynical bent in childhood. His earliest experiences were with the hard realities of life. His childhood was crowded with grave and distracting anxiety for his parents' and his own future. Owing to some family disputes, his father had been left almost penniless; and at a trying juncture, while deeply in debt, the elder Bethel's nearest relations turned against him, and he came near a debtor's prison. These troubles of his childhood and early life probably weighed so heavily on Westbury's mind as to engender a bitterness from which he never recovered. The self-denying efforts of his parents in his behalf were remembered with deepest gratitude. In a letter written to Lord Selborne only two months before his death, he said: "When I was made lord chancellor, I may truly say the chief feeling that arose in my mind was not that of pride or gratified vanity, but of sincere gratitude that I had lived to fulfil the predictions and the fond hopes of my father, to whom I owed all my education and all the means that had enabled me to fulfil what, when they were first formed, were but idle anticipations."



man's favor, but both at the bar and in politics had been independent even to a fault.

His success at the bar was remarkable. His views were expressed with an assurance that seemed to admit of no question. He used to say that he was paid for his opinions, not for his doubts.<sup>1</sup> The ascendancy he acquired over the mind of Vice-Chancellor Shadwell, in whose court he practised upon taking sick, became a subject of comment; legal wits said that "Shadwell had set up an altar in Bethel whereat to worship." As chancellor, nothing puzzled him. If he ever had any doubts, he never admitted them.<sup>2</sup> But the temper of his mind was not calculated to make him popular with his brethren at the bar or his colleagues on the bench; for most of them, at one time or another, he took occasion to express his contempt.<sup>3</sup>

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<sup>1</sup> A characteristic anecdote is told in connection with his first bill of exceptions. Never having seen any exceptions before, he drew them by the light of nature, and went before the master to support them. The master observed that he had never seen any exceptions in that form before. "Most probably not, sir," replied Westbury, "but I will defy my learned friend, or any one else, to indicate any particular in which these exceptions fail to attain the object for which exceptions are designed."

He was never at a loss for an answer. Having given his opinion at a consultation, he was confronted with a former opinion in which he had taken a contrary view. "It is a matter of astonishment to me," he said, "that any one capable of penning such an opinion should have risen to the eminence I have the honor to enjoy." On another occasion, while arguing a case before Lord Campbell, he was asked for his authority for a statement. "My Lord," he replied, "such is the law; but as I have to be elsewhere shortly, my friend, Mr. Archibald, will quote the cases in support of it." Mr. Archibald was seen to leave the court hastily.

<sup>2</sup> On the day he took his seat in the Court of Appeal in Chancery, a motion was made to set a case for hearing before the full court. "The case," said Westbury, "will be put in the lord chancellor's list. The court is full."

<sup>3</sup> On one occasion, the court having risen at the conclusion of Westbury's argument, his junior, who was to follow, remarked that he thought Westbury had made a strong impression on the court. "I think so, too," was the reply; "don't disturb it." He addressed the judges with equal freedom. "Mr. Bethel," said Lord Justice Knight-Bruce in the course of an argument, "I have heard you use that argument twice already." "Very likely, my Lord," was the retort, "for it is only by the continual dripping of the water on the stone that any impression is created." His bold denunciation of Knight-Bruce's habit of prejudging cases gave great satisfaction to the profession. His lordship, in the course of an argument, having expressed surprise at a proposition asserted by Westbury, the latter replied: "Your Lordship will hear this case first, and if your Lordship thinks it right you can express surprise afterwards. I deprecate any observations until the case is fully heard, and the proper time for the discharge of judicial duties begins."

Lord Campbell was his pet aversion. He took malicious delight in reversing his predecessor's conclusion by reference to "a few elementary principles." His feelings towards the rest of the judges apparently differed only in degree. On one occasion, having listed an appeal for hearing, he was reminded by the court that only motions of course would be heard. "But this is a motion of course," he said, "or at least its

In the theological controversies of his time, which absorbed so large a measure of public interest, he played a characteristic part. Baiting the bench of bishops in the House of Lords came to be his favorite occupation.<sup>1</sup> He told Dr. Jowett that until theological questions came before the courts he had believed what was ordinarily believed by members of the Church of England, but that when he began to examine for himself he was surprised to find how slender was the foundation of many statements which were confidently propounded by theologians. In 1860 he blocked the attempt of the High Church party to obtain legal condemnation of unorthodox views in the action brought against Dr. Williams and Mr. Wilson, two contributors to the celebrated "Essays and Reviews," who were charged with denying the plenary inspiration of the Scriptures. Westbury's opinion proceeds upon the theory that the court had no power to pronounce any opinion on the character, effect, or tendency of the book, adopting the rule formulated in the *Gorham* case, fourteen years before, that the court had no jurisdiction to determine matters of faith or doctrine on which the church had prescribed no definite rule of opinion; it had only to ascertain the true construction of the articles and formularies with reference to the charges preferred, according to legal rules for the interpretation of written documents.<sup>2</sup> Thereupon the High Church party, relying upon the influence of Bishop Wilberforce in convocation, secured the formal condemnation of the whole book as heretical by means of a judgment of the synod,—a course which had been pursued but once in three centuries. This action led Lord Houghton, in the House of Lords, to put a series of questions as to the powers of convocation to pass a synodical judgment on books, and as to the immunity of its members from legal proceedings consequent thereon. Lord Westbury, in reply, delivered one of his most characteristic and best known speeches. "There are," he said, "three modes of dealing with

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equivalent. It is an appeal from Vice Chancellor —." He once asked Sir William Erle why he did not attend the sessions of the Privy Council. "Because I am old and deaf and stupid," replied Erle. "But that's no reason at all," said Westbury, "for I am old and Napier is deaf and Colville is stupid, and yet we make an excellent Court of Appeal." Some one having wondered why Lord Chancellor Cranworth habitually sat with the lords justices, Westbury expressed the opinion that "it doubtless arose from a childish indisposition to be left alone in the dark."

<sup>1</sup> He objected to Wilberforce's Bishops' Resignation Bill on the ground that "the law in its infinite wisdom had already provided for the not improbable event of the imbecility of a bishop."

<sup>2</sup> 3 New Repts. 494.



convocation, since it has been permitted — which I deeply regret — to come into action again and transact business. The first is, while they are harmlessly busy, to take no notice of their proceedings; the second is, when they seem likely to get into mischief, to prorogue them and put a stop to their proceedings; the third, when they have done something clearly beyond their powers, is to bring them to the bar of justice for punishment.” After referring to the laws passed to secure the royal supremacy, he continued: “I am afraid my noble friend [Lord Houghton] has not considered what the pains and penalties of a *præmunire* are, or his gentle heart would have melted at the prospect. The most reverend primate and the bishops would have to appear at this bar, not in the solemn state in which we see them here, but as penitents in sack-cloth and ashes. And what would be the sentence? I observe that the most reverend primate gave two votes, his original vote and a casting vote. I will take the measure of his sentence from the sentence passed by a bishop on one of these authors, — a year’s deprivation of his benefice. For two years, therefore, the most reverend primate might be condemned to have all the revenues of his high position sequestered. I have not ventured — I say it seriously — I have not ventured to present this question to her Majesty’s government, for, my Lords, only imagine what a temptation it would be for my Right Hon. friend the Chancellor of the Exchequer to spread his net and in one haul take in £30,000 from the highest dignitary, not to speak of the *οἱ πολλοὶ*, the bishops, deacons, archdeacons, canons, vicars, all included in one common crime, all subject to one common penalty.” He then proceeded to ridicule the judgment. “I am happy to tell your Lordships that what is called a synodical judgment is a well-lubricated set of words, a sentence so oily and saponaceous that no one can grasp it; like an eel it slips through your fingers. . . . Convocation could not have been more successful, if they had synodically sat down to produce a sentence of no meaning, than they were when in their labor they produced this *ridiculous mus.*” By interposing convocation, he said, they interposed an anomalous body exercising jurisdiction uncontrolled by any court of appeal, and not amenable to the crown. “Those who do not concur in these proceedings probably think that by protesting against such a course they may save themselves from consequences; but if they will take my recommendation, whenever there is any attempt to carry convocation beyond its proper limits, their best security after protesting will be to gather up their garments and flee, and remembering the pillar of

salt, not to cast a look behind. I am happy to say that in all these proceedings there is more smoke than fire, though they do not, probably, proceed from a spirit that is equally harmless." His action in the Colenso case, in the following year, added, if possible, to the hatred with which he was regarded by dogmatic theologians.<sup>1</sup>

It was to be expected that Westbury would have many enemies, and there were others who, while not open enemies, were not averse to taking advantage of the first opportunity to humble his pride. In 1865 two cases of official delinquency arising out of the distribution of the patronage of his office furnished a rallying ground for the disaffected.<sup>2</sup> It will be sufficient to say that Westbury's personal honor was in no way involved, and the most that could be said against him was that he had failed to exercise proper caution. Indeed, the committee of the House appointed to investigate the matter acquitted him of improper motives; but they observed that the general impression created by the circumstances was calculated to excite suspicion, and that the inquiry had been highly desirable. Thereupon the opposition moved a vote of censure, which was finally carried. It recited that the acts in question "show a laxity of practice and a want of caution with regard to the public interests, on the part of the lord chancellor, in sanctioning the grant of retiring pensions to public officers against whom grave charges were pending, which, in the

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<sup>1</sup> A wit suggested the following epitaph:—

" Richard, Baron Westbury,  
Lord High Chancellor of England.  
He was an eminent Christian,  
An energetic and merciful statesman,  
And a still more eminent and merciful judge.  
During his three years tenure of office  
He abolished the ancient method of conveying land,  
The time honored institution of the Insolvents' Court  
and  
The eternity of punishment.  
Towards the close of his earthly career,  
In the Judicial Committee of the Privy Council,  
He dismissed Hell with costs  
And took away from the Orthodox members of the  
Church of England  
Their last hope of everlasting damnation."

<sup>2</sup> The occasion was the retirement on pensions of two clerks against whom charges of official misconduct were pending. It was charged that Westbury had allowed them to retire, so that he might appoint his own relatives. But the specific complaint was that the men were not promptly dismissed, and it is difficult to understand how the offices became more vacant or more at his disposal by resignation than they would have been by dismissal.



opinion of the House, are calculated to discredit the administration of his great office." Westbury thereupon resigned.<sup>1</sup> His retiring speech was a model of dignity and urbanity. In closing he said: —

"With regard to the opinion which the House of Commons has pronounced, I do not presume to say a word. I am bound to accept the decision. I may, however, express the hope that after an interval of time calmer thoughts will prevail, and feelings more favorable to myself be entertained. I am very thankful for the opportunity which my tenure of office has afforded me to propose and pass measures which have received the approbation of parliament, and which I believe, nay, I will venture to predict, will be productive of great benefit to the country. . . . My Lords, it only remains to thank you, which I do most sincerely, for the kindness which I have uniformly received at your hands. It is very possible that by some word inadvertently used, some abruptness of manner, I may have given pain or exposed myself to your unfavorable opinion. If that be so, I beg of you to accept the sincere expression of my regret, while I indulge the hope that the circumstances may be erased from your memories."

The law reports contain about two hundred and fifty cases in which Lord Westbury formulated an opinion. In reading them, one is struck at once with the power and facility displayed in stripping cases of complicated and bewildering details and reducing them to simple, intelligible propositions.<sup>2</sup> Impatient of author-

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<sup>1</sup> An incident of the occasion shows his urbanity and courage. Lord Ebury had brought in a bill to effect certain changes in the burial service, which had been thrown out. As Westbury was leaving the House he said to Lord Ebury, "My Lord, you may now read the burial service over me, with any alterations you think proper." Wilberforce, with whom Westbury's relations had become strained, relates in his memoirs that some time afterwards they met in the lobby of the House, whereupon Westbury stopped him, saying, "My Lord Bishop, as a Christian and a bishop, you will not refuse to shake hands." Wilberforce immediately complied. Westbury then said: "Do you remember where we last met? It was in the hour of my humiliation, when I was leaving the Queen's closet, having given up the great seal. I met you on the stairs as I was coming out, and I felt inclined to say, 'Hast thou found me, oh mine enemy?'" Wilberforce used to say that he was greatly tempted to finish the quotation: instead he replied, "Does your Lordship remember the end of the quotation?" "We lawyers, my Lord Bishop," answered Westbury, "are not in the habit of quoting part of a passage without knowing the whole."

<sup>2</sup> In addition to the cases hereafter mentioned, see *Peck v. North Staffordshire Ry.*, 10 H. L. 565; *O'Brien v. Lewis*, 32 L. J. Ch. 569; *English Credit Co. v. Arduin*, 5 E. & I. App. 76; *Daniel v. Metropolitan Ry.*, 5 E. & I. App. 59; *Barber v. Myerstein*, 4 E. & I. App. 335; *Shepherd v. Harrison*, 5 E. & I. App. 128; *Dixon v. Evans*, 5 E. & I. App. 612; *Mersey Docks v. Gibbs*, 1 E. & I. App. 126; *City of Glasgow Ry. v. Hunter*, 2 Scotch & Div. App. 85; *Isenburg v. East Indian Estates*, 33 L. J. Ch. 392.

ity, he proposed to ground his decision on elementary principles. It is common to find such opening statements as these:—

“My Lords, we are all exceedingly glad when, in a collection of miserable technicalities such as these which are before us here, we can see our way to something like a solid and reasonable ground of decision.”<sup>1</sup>

“There is no difficulty at all in the matter, and if the general rules of law were more steadily kept in view it would be unnecessary to range up and down a variety of decisions, because those rules would afford the best answer and secure the removal of every difficulty.”<sup>2</sup>

His skill in exposition was of the highest order. Without detailing the raw materials of his conclusion, he was in the habit of stating at the outset of his opinions the general principles of law by which the action should be determined. His statement of the principles of extra-territorial jurisdiction in *Cookney v. Anderson*<sup>3</sup> is a good illustration of his style:—

“In explanation of my decision in this case, it is necessary to begin by referring to some well-established general principles. The courts of civil judicature in every country sit to administer the municipal law of that country, and their jurisdiction is therefore limited and territorial. It is true that the duty of yielding obedience to the law of his native country may follow the native subject of that country wherever he resides; for every nation has a right to bind its own natural-born subjects by its own laws in every place. Municipal law, therefore, may provide that judgments and decrees may be lawfully pronounced against natural-born subjects when absent abroad, and may also enact that they may be required to appear in the courts of their native country even whilst resident in the dominions of a foreign sovereign. If a statutory jurisdiction be thus conferred, courts of justice in the exercise of it may lawfully cite, and on non-appearance give judgment in civil cases against natural-born subjects whilst they are absent beyond seas in a foreign land. This jurisdiction depends on the statute or written law of the country. Where it is not expressly given, it cannot be lawfully assumed. If such a law does not exist the general maxim applies, *extra territorium jus discenti impune non paretur*. But as international law in private rights is, so far as it has been clearly established, a part of municipal law, it follows that the law of a country, which gives to its municipal tribunals authority to exercise jurisdiction as to persons and things which are beyond the confines of their own territories, may also, consistently with international law, be extended in certain cases to persons who are not natural-born

<sup>1</sup> *Scott v. Bennett*, 5 E. & I. App. 251.

<sup>2</sup> *Attorney-General v. Campbell*, 5 E. & I. App. 529. See, also, *Rose v. Watson*, 10 H. L. 677.

<sup>3</sup> 32 L. J. Ch. 427.



subjects. For, where it is well settled by the comity of nations that any question of private right falls to be decided by the law of a particular country, it would seem reasonable that the courts of that country should receive jurisdiction and the power of citing absent parties, though residing in a foreign land. Thus, by way of example, it is generally agreed by European nations that all questions relating to the ownership of land must be decided by the *lex loci rei sitæ*; that all questions relating to the succession or administration of the property of a deceased person, whether testate or intestate, belong to the judge of the domicile of the deceased; and that contracts ought to be applied and interpreted by the law of the place where they are made, and where it is intended they should be performed. If, therefore, an action or a suit be commenced in the courts of a particular country relating to a subject which, by the consent of nations, is appropriated to the law of that country, it may be right, in order to prevent a failure of justice, to give to such courts the power of exercising complete jurisdiction, and therefore of citing absent parties, under the penalty, if they do not appear, of having judgment pronounced against them in their absence. But it is a jurisdiction that should be given and exercised with great caution, and only where it is clear, on the principles of public law, that the judgment against the absent party ought to be treated as binding by the courts of foreign countries. The right of administering justice is the attribute of sovereignty, and all persons within the dominions of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served on the territory of another, and summons a foreign subject to his court of justice, it is in fact an invasion of sovereignty, and would be unjustifiable unless done with consent, which is assumed to be the fact if it be done in a case where a foreign judgment would by international law be accepted as binding. For, besides the general maxim which I have already cited, and which limits the jurisdiction of every tribunal to its own territory, there is another general rule, *actor sequitur forum rei*; and both are violated when the territorial judge cites and pronounces judgment against a person who does not appear and is absent in another territory. There are, therefore, two grounds on which the legislature of any country is warranted in conferring on its civil tribunals an extra-territorial jurisdiction,—one, the right which it possesses of binding universally by its laws the persons who owe to it a natural allegiance; the other, the right which it receives by international law, that is, from the consent of nations, of summoning all persons interested, wherever resident, when the subject of suit arises or is situate within its own territory, and falls to be determined by its own law and the judgment of its own courts of civil judicature.”<sup>1</sup>

<sup>1</sup> For further examples of clear statement of law and facts see *Ex parte Harding*, 33 L. J. Bank. 26; *Spirett v. Willows*, 34 L. J. Ch. 365; *Weston v. Collins*, 34 L. J. Ch. 353; *Bickett v. Morris*, 1 Scotch & Div. App. 60; *New Brunswick Ry. v. Cwynbeare*,

Although his want of respect for authorities<sup>1</sup> may sometimes have led him to go somewhat beyond the mark, his acuteness of mind was always restrained, in his judicial functions at least, by common sense. For example, in *Overend & Gurney Co. v. Gibbs*,<sup>2</sup> he said : —

"I think it would be a very fatal error in the verdict of any court of justice to attempt to measure the amount of prudence that ought to be exercised by the amount of prudence which the judge himself might think under similar circumstances he should have exercised. I think it extremely likely that many a judge, or many a person versed by long experience in the affairs of mankind as conducted in the mercantile world, will know that there is a great deal more trust, a great deal more speculation, and a great deal more readiness to confide in the probabilities of things with regard to success in mercantile transactions, than there is on the part of those whose habits of life are entirely of a different character. It would be extremely wrong to import into the consideration of the case of a person acting as a mercantile agent, in the purchase of a business concern, those principles of extreme caution which might dictate the course of one who is not at all inclined to invest his property in any ventures of such a hazardous character."

His opinion in *Thompson v. Hudson*<sup>3</sup> is a characteristic expression of his aversion for technicalities : —

"I am sure your Lordships will agree with me that the appellants have been very unfortunate in this litigation. In answer to the questions which they were required to answer in the Chamber of the Master of the Rolls, they thought that it was very rational and very right for a creditor to say to his debtor, 'Provided you pay me half of the debt or two thirds of the debt on an appointed day, I will release you from the rest, and will accept the money so paid in discharge of the whole debt; but if you do not make payment of it on that day, then the whole debt shall remain due to me, and I shall be at liberty to recover it.' If you were to put that proposition to any plain man walking the streets of London, there could be no doubt at all that he would say that it is reasonable and accordant with common sense. But if he was told that it

9 H. L. 722; *Tyrrell v. Bank of London*, 10 H. L. 38; *Taafe v. Conmee*, 10 H. L. 74; *Beative v. Hodgson*, 10 H. L. 663; *Rose v. Watson*, 10 H. L. 677; *Parker v. Tootal*, 11 H. L. 154; *Cullen v. Atty.-Gen.* 1 E. & I. App. 198; *Williams v. Bayley*, 1 E. & I. App. 216; *Atty.-Gen. v. Campbell*, 5 E. & I. App. 529; *Knox v. Gye*, 5 E. & I. App. 670.

<sup>1</sup> *Gaun v. Free Fishers of Whitstable*, 11 H. L. 192, is an illustration of his disregard for authorities to which he was not absolutely bound to defer. He persistently opposed to prevailing view with respect to compensation for acts authorized by statute, *Ricket v. Metropolitan Ry.*, L. R. 2 H. L. 175; *Glasgow Ry. v. Hunter*, L. R. 2 H. L. Sc. 78; *Duke of Buccleuch v. Metropolitan Bd. of Works*, 5 E. & I. App. 461.

<sup>2</sup> 5 E. & I. App. 495.

<sup>3</sup> 4 E. & I. App. 1.



would be requisite to go to three tribunals before you could get that plain principle and conclusion of common sense accepted as law, he would undoubtedly hold up his hands with astonishment at the state of the law."

In *Martin v. Holgate*<sup>1</sup> he touched the source of much of the confusion in the interpretation of wills when he said : —

"A judge is not justified in departing from the plain meaning of words which admit of a rational interpretation for the purpose of giving effect to an assumed interpretation which appears to him to be more rational or more consistent with the rest of the will."

Lord Westbury's substantial contributions to the law deal mostly with topics that fall outside the ambit of well-settled authority. In international law, especially in the domain of what has been called private international law, he rendered many decisions of importance.<sup>2</sup> The statement of principles in the case of *Udny v. Udny* is worth quoting as a fine specimen of exposition : —

"The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions, — one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother, if illegitimate. This has been called the domicile of origin, and is involuntary. Other domiciles, including domicile by oper-

<sup>1</sup> 1 E. & I. App. 188.

<sup>2</sup> *Udny v. Udny*, 1 Scotch & Div. App. 457; *Cookney v. Anderson*, 32 L. J. Ch. 427; *Ex parte Chavasse*, 34 L. J. Bank. 17; *Enohin v. Wylie*, 10 H. L. 1; *Bell v. Kennedy*, 1 Scotch & Div. App. 320; *Shaw v. Gould*, 3 E. & I. App. 80.

ation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed to suppose that it is capable of being, by the act of the party, entirely obliterated and extinguished. It revives and exists when there is no other domicile, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicile of choice. Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors or the relief from illness; and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, as soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established. The domicile of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal, but it cannot be destroyed by the will and act of the party. Domicile of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner."

The law relating to trade-marks and patents was another congenial subject.<sup>1</sup> He rendered several decisions of permanent value on the law of prescriptive easements.<sup>2</sup> Certain miscellaneous decisions of general value will be familiar to the professional reader: *Holroyd v. Marshall*,<sup>3</sup> *St. Helen's Smelting Co. v. Tipping*,<sup>4</sup> *Blades v. Higgs*,<sup>5</sup> *Taylor v. Meades*,<sup>6</sup> *Isenberg v. East Indian Estates Co.*,<sup>7</sup> *Lister v. Perryman*,<sup>8</sup> *Sackville West v. Holmesdale*.<sup>9</sup>

<sup>1</sup> *Leather Cloth Co. v. Leather Cloth Co.*, 33 L. J. Ch. 199; *McAndrew v. Bassett*, 33 L. J. Ch. 561; *Witherspoon v. Currie*, 5 E. & I. App. 521; *Hills v. Evans*, 31 L. J. Ch. 458; *Betts v. Menzies*, 10 H. L. 151; *Horwood v. Great Northern Ry.*, 11 H. L. 676.

<sup>2</sup> *Tapling v. Jones*, 11 H. L. 303; *Suffield v. Brown*, 33 L. J. Ch. 249; *Backhouse v. Bonomi*, 9 H. L. 503.

<sup>3</sup> 10 H. L. 208.

<sup>4</sup> 11 H. L. 649.

<sup>5</sup> *Ib.* 630.

<sup>6</sup> 34 L. J. Ch. 203.

<sup>7</sup> 33 L. J. Ch. 392.

<sup>8</sup> 5 E. & I. App. 538.

<sup>9</sup> *Ib.* 565.



As time goes on, it is likely that Lord Westbury's hope that he might be remembered in connection with his legal reforms will be realized. His heart was undoubtedly in this work, and he pursued it with a continuity of purpose that he failed to maintain in any other direction. He possessed many of the great qualities necessary for a law reformer; his mind was comprehensive as well as acute, and to his wide knowledge of general principles he brought an extensive practical acquaintance with the subject. But he was unsuited by temperament for the patient diplomacy by which radical legislative action is attained. The list of his legislative achievements<sup>1</sup> justifies his expectations of remembrance; but his accomplishments were feeble compared with his projects. In his great speech of 1863 in the House of Lords he proposed such a systematic scheme of law reform as had never been conceived before except in the master mind of Lord Bacon. Since then, others have carried on the work begun by him; and, as the outline of his splendid conception is gradually filled in by accomplished fact, it becomes a liberal profession to remember Lord Westbury for his lofty ideals as well as for his actual achievements.

*Van Vechten Veeder.*

CHICAGO, November 1, 1899.

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<sup>1</sup> 1857, Probate and Administration Bill, Divorce and Matrimonial Bill; 1861, Bankruptcy and Insolvency Bill; 1861, First Statute Law Revision Bill; 1862, Land Registration Bill; 1863, Second Statute Law Revision Bill. He was an ardent supporter of Lord Selborne's Judicature Act of 1873.

## THE RIGHT TO LOCAL SELF-GOVERNMENT.

## II.

IN 1643-44 the general assembly changed the name of the island from its Indian name of Aquethnec (Aquidneck) to "The Isle of Rhodes, or Rhode Island," by which name it has since been known. The dual name of "The State of Rhode Island and Providence Plantations," still the official style and name of the state, arose from the union of the Aquidneck government with that of "Providence Plantations," under the charter of 1663.

The general officers elected in 1641 continued in office until the government set up under the first charter was organized in 1647. The records of the general court of this union cease in 1644, and the town records of Newport are lacking. The mutilated pages of the Portsmouth town records help to fill the gap, and they confirm the fact that, if no general court was convened in this interval, town meetings were held in both towns, and their decrees were duly executed. Three of the four original colonies of Rhode Island have therefore enjoyed a period of independent sovereignty as separate towns, and two of them as a union of towns, although the united colony under the charters, both of 1643-44 and of 1663 and the state, never have been independently sovereign.

Arnold<sup>1</sup> says that: "Before that period" (the combination under the first charter) "each town was in itself sovereign, and enjoyed a full measure of civil and religious freedom."

"But in the scattered communities which grew up on Rhode Island soil between 1636 and 1647, there were lacking not only organic law in common, but even documentary agreement in common, and also any delegation of authority from outside their limits, — until the patent, whose provisions went into effect in 1647."<sup>2</sup>

As was well said in *The Nation*:<sup>3</sup> —

"The diversity of character and interest in the smallest of the colonies is another illustration of the truth taught by Greek and Italian history, that it is not always the largest States that afford the most instructive data for political history."

<sup>1</sup> Hist. R. I. p. 487.

<sup>2</sup> Foster's *Town Government in Rhode Island*, p. 12.

<sup>3</sup> Vol. 39, p. 117.



Milton, that profound political thinker as well as poet, in his pamphlet entitled "Ready and Easy Way to Establish a Free Commonwealth," said, in language pregnant with meaning:—

"Nothing can be more essential to the freedom of a people than to have the administration of justice and all public ornaments in their own election and within their own bounds, without long travelling or depending upon remote places to obtain their right or any civil accomplishment, so it be not supreme but subordinate to the general power and union of the whole republic: in which happy firmness, as in the particular above mentioned, we shall also far exceed the United Provinces, by having, not as they do, to the retarding and distracting oftentimes of their counsels on urgent occasions, many sovereignties united in one commonwealth, but many commonwealths under one united and entrusted sovereignty."<sup>1</sup>

It is well known that Milton and Roger Williams were friends, and saw much of each other on Williams's visits to England. We have Williams's own testimony that he taught Milton Dutch, and in return Milton read him "many more languages." In imagination we see these two great souls communing over the establishment of these colonies, holding forth "a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concerns," and it may be that it was Williams's report to Milton of the success of that experiment in Rhode Island that led him to write the above.

Bryce says, speaking of Rhode Island:—

"This singular little commonwealth, whose area is 1085 square miles (less than that of Ayrshire or Antrim), is, of all the American states, that which has furnished the most abundant analogies to the Greek republics of antiquity, and which deserves to have its annals treated of by a philosophic historian."<sup>2</sup>

Bancroft, our great historian,<sup>3</sup> has well said:—

"The annals of Rhode Island, if written in the spirit of philosophy, would exhibit the forms of society under a peculiar aspect: had the territory of the State corresponded to the importance and singularity of the principles of its early existence, the world would have been filled with wonder at the phenomena of its history."

The existence of towns was an admitted underlying fact when the parliamentary charter of 1643 and the royal charter of 1663 were accepted, and there arose an unwritten constitution, a part of which was the right of the towns to administer their own local

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<sup>1</sup> 2 Milton, *Prose Works*, Boston, 1826, 299.

<sup>2</sup> 1 *Am. Commw.* 18.

<sup>3</sup> Vol. I, p. 380.

affairs. The extent and variety of these powers of self-control over their own local affairs far exceeded those of any other state, and they continue in force at the present day in Rhode Island in nearly their full vigor.

Early in the summer of 1643 Roger Williams embarked for England from New York in a Dutch ship, being compelled to this course by the refusal of Massachusetts to permit him to pass through their limits, or to take passage in one of their ships. He had been selected by the Rhode Island government we have been considering, and that of Providence, to procure a charter for both governments. He succeeded in his efforts, and returned in 1644, bringing with him the charter uniting the three colonies of Providence, Portsmouth, and Newport as "The Incorporation of Providence Plantations in the Narragansett Bay in New England." This charter was very general in its provisions; indeed, it may be said that it conferred complete independence upon the colony. It was fettered with but one proviso, *i. e.*, that "the laws, constitutions, and punishments for the civil government of the said Plantation be conformable to the laws of England, so far as the nature and constitution of that place will admit."

But it was not until May, 1647, that the freemen of the three colonies named in the charter — Providence, Portsmouth, and Newport, together with the freemen of Warwick, another colony, settled the year Roger Williams was sent to England to procure this charter — met at Portsmouth, accepted the charter, and formed a government under it for the united colony that afterwards became the state of Rhode Island. The record of this meeting at Portsmouth is to be found in 1 R. I. Col. Recs. 149 to 207, and should be carefully studied by every one investigating the genesis of this state. The following are extracts from this record: —

"2. It was Voted and found that the major parte of the Colonie was present at this Assembly, whereby there was full power to transact,"<sup>1</sup>

That is to say, this first meeting of the incorporated, formally held, to accept the charter, was in fact what the name imports, a general assembly of the whole body of freemen.<sup>2</sup>

It was agreed that a quorum of forty might "act as if the whole were present, and be of full authority." The general assembly

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<sup>1</sup> 1 R. I. Col. Recs. 147.

<sup>2</sup> The freemen of the towns continued to meet thus in Newport, either in person or by proxy, every May and October, to decide who should represent them in the General Assembly for the next six months, until 1760. 6 R. I. Col. Recs. 256.



being thus organized, "It was agreed that all should set their hands to an engagement to the charter." The representative system was adopted by ordering that "a week before any general court, notice should be given to every town by the head officer that they chose a committee for the transaction of the affairs there," and they provided for a proxy vote in the words, "and such as go not may send their votes, sealed." They then adopted a remarkable code of laws, and elected general officers by ballot, to continue in office for one year, or till new be chosen.

Warwick, founded in 1642-43, was admitted to the union, although not named in the charter, the record being: "It was agreed that Warwick should have the same privileges as Providence,"<sup>1</sup> thus furnishing a precedent for the admission of other towns afterwards, and putting them all on the same footing.

The growth of Warwick had been hindered by dissensions among its founders; an attempted surrender of jurisdiction, by some of the settlers, to Massachusetts; the foray from Massachusetts of officers and forty soldiers that captured the Gortonists after a siege, carried them as prisoners to Boston, where they were tried for heresy and sedition and found guilty, as "blasphemous enemies of the true religion of our Lord Jesus Christ and His holy ordinances, and also of all civil authority among the people of God, and particularly in this jurisdiction."

Gorton and six others were sentenced to be confined in irons during the pleasure of the court, to be set to work, and to suffer death should they break jail or in any way proclaim heresy or reproach to the church or state. Their cattle were appraised and sold to defray the cost of seizure and trial. Massachusetts continued her claim of jurisdiction over Warwick until 1665, with warning against any one's settling there without leave of their general court, forbidding the return of the Gortonists after their release from jail, and placing their houses at the disposal of petitioners for the Warwick land.

Extract from report of the king's commissioners concerning the New England colonies, made December, 1665: —

"The Matachussetts did maintain Pumham (a petty sachim in this Province) twenty yeares against this Colony, and his chiefe sachim, and did by armed soldiers besiege and take prisoners Mr. Gorton, Howden, Wykes, Greene and others in this Province, and carry'd them to Boston, put them in chaines, and took eighty head of cattle from them, for all which they could never get satisfaction."<sup>2</sup>

<sup>1</sup> 1 R. I. Col. Recs. 148.

<sup>2</sup> John Carter Brown MSS. 1, No. 63.

At the first general assembly held at Portsmouth in 1647 to accept the charter, and to organize the new government under it, the following was adopted: —

"For the Province of Providence, It is agreed by this present Assembly thus incorporate, and by this present act declared, that the forme of Government established in Providence Plantations is **Democraticall**, that is to say, a Government held by y<sup>e</sup> free and voluntarie consent of all, or the greater parte of the free Inhabitants."<sup>1</sup>

The instructions from the town of Providence to its committee, which, with other committees from the towns of Portsmouth, Newport, and Warwick, were to meet at Portsmouth on the 18th of May, 1647, for the purpose of accepting the charter and organizing a government under it, may be found in 1 R. I. Col. Recs. 42, and are deserving of study. The second instruction is copied in the following record of the proceedings thereupon of the general assembly:—

"6. It was ordered, upon the request of the Commissioners of the Towne of Providence, that their second instruction should be granted and established unto them, Vidy't. Wee do voluntarily assent and are freely willing to receive and to be governed by the Lawes of England, together with the way of the Administration of them, soe far as the nature and constitution of this Plantation will admit desiring (soe far as possible may be) to hold a correspondence with the whole Colonie in the modell that hath been lately shewn vnto us by our worthy Friends of the Island, if the Generall Courte shall compleat and confirm the same, or any other Modell as the Generall Courte shall agree vpon according to our charter."<sup>2</sup>

Obviously the example set by the union of the two island towns was bearing fruit. It had been tried, found to work well, and now Providence desired to join the union, and to follow the "Modell" set.

In 1648-1649 a special general assembly was held at Warwick, in March, but there is no record of their proceedings (Staples, *Annals of Providence*, 72). At this session the following charter was granted to the town of Providence, obviously in reply to the foregoing application: —

"Whereas, by virtue of a free and absolute charter of civil incorporation granted to the free inhabitants of this colony of Providence, by the Right Honorable Robert, Earl of Warwick, Governor in chief with the rest of the Honorable Commoners bearing date the 7th day of March, 1643, giving and granting full power and authority unto the said inhabitants to govern themselves and such others as shall come among them, as also to

<sup>1</sup> 1 R. I. Col. Recs. 156.

<sup>2</sup> *Ib.* 147, 1647.



make, constitute and ordain such laws, orders and constitutions, and to inflict such punishments and penalties as is conformable to the laws of England, so near as the nature and constitution of the place will admit, and which may best suit the estate and condition thereof, and whereas the said towns of Providence, Portsmouth, Newport and Warwick are far remote each from other, whereby so often and free intercourse of help, in deciding of differences and trying of causes and the like, cannot easily and at all times be had and procured of that kind is requisite: therefore upon the petition and humble request of the freemen of the Town of Providence, exhibited unto this present session of the General Assembly, wherein they desire freedom and liberty to incorporate themselves into a body politic, and we, the said Assembly, having duly weighed and seriously considered the premises, and being willing and ready to provide for the ease and liberty of the people, have thought fit and by the authority aforesaid, and by these presents, do give, grant and confirm unto the free inhabitants of the town of Providence, a free and absolute charter of civil incorporation and government to be known by the Incorporation of Providence Plantation in the Narragansett Bay in New England, together with full power and authority to govern and rule themselves, and such others as shall hereafter inhabit within any part of the said Plantation, by such a form of civil government as by voluntary consent of all, or the greater part of them, shall be found most suitable unto their state and condition: and to that end, to make and ordain such civil orders and constitutions, to inflict such punishments upon transgressors, and for execution thereof, and of the common statute laws of the colony agreed unto, and the penalties, and so many of them as are not annexed already unto the colony court of trials, so to place and displace officers of justice as they or the greater part of them shall, by one consent, agree unto. Provided nevertheless, that the said laws, constitutions and punishments, for the civil government of the said plantation, be conformable to the laws of England, so far as the nature and constitution of the place will admit, yet always reserving to the aforesaid General Assembly power and authority so to dispose the general government of that plantation as it stands in reference to the rest of the plantations as they shall conceive, from time to time, most conducing to the general good of the said plantations. And we the said Assembly, do further authorize the aforesaid inhabitants to elect and engage such aforesaid officers upon the first second day of June annually. And moreover, we authorize the said inhabitants, for the better transacting of their public affairs, to make and use a public seal as the known seal of Providence in the Narragansett Bay, in New England.

"In testimony whereof, we, the said General Assembly, have hereunto set our hands and seals the 14th of March anno 1648.

"JOHN WARNER, Clerk of the Assembly."<sup>1</sup>

<sup>1</sup> Staples, *Annals of Providence*, p. 72, copied thence in *R. I. Col. Recs.* 214, but with spelling changed.

Staples, in *Annals of Providence*, p. 74, says: —

"This charter was intended to strengthen the municipal government of Providence. To have been more useful, it should have prescribed a form of government to be adopted. There is no reference to this charter in the records of the town, neither a petition for it, nor acceptance of it. There is a copy of it in the city clerk's office, engrossed on parchment, which is now almost illegible. A similar charter, bearing date the same day, was granted to Warwick; and, it is presumed, Portsmouth and Newport had like charters."

Unfortunately this copy engrossed on parchment has disappeared since Staples's time. But for Staples, we should not now know that such a charter had ever been granted. It is true a portion of this charter is to be found recorded at p. 70 of the "Old Burnt Book," so called, of the Records of Providence, being the second book of the Town of Providence. This portion may be found reprinted in vol. 2 of the invaluable *Early Records of the Town of Providence*, printed by the Record Commissioners of the City of Providence in 1893, where an interesting account will be found of the vicissitudes this book has undergone. When the town was partially destroyed by fire by the Indians in 1676, this original volume, with other town records, narrowly escaped destruction. The original spelling of the portion still extant is given<sup>1</sup> as illustrative of the accuracy and historical value of the work of these commissioners.

"all, or the greatest part of them shall be found most sutable to their estate & condition, & to that end, to make & ordain such Civill orders & Constitutions, & to inflict such punishments upon transgressors; & for execution thereof & of the Comon Law of the Colony agreed unto, & the penalties & so many of them as are not añexed already unto the Colony Court of Tryall to place & displace Officers of Justice, as they or the greatest part of them shall by free consent agree unto, provided neverthelesse, that the said Lawes, Constitutions & punishments for the Civill Government of the said Plantation, be conformable to the Lawes of England, so far as the nature & constitution of that place will admit: yet always reserving to the abovesaid Generall Assembl: power & Authority to dispose the Gen: Government of y<sup>t</sup> Plantation, as it stands in reference to the rest of the Plantations: & we the said Assembl<sup>y</sup> do further Authorize the aforesaid Inhabitants to elect & ingage all such aforesaid Officers upon the 1st 2nd day of June Annually; And moreover we authorize the said Inhabitants for the better transacting of their publike affaires to make & use a Publike Seale as the Known Seale of Providence Plantation In the Narraganset Bay In New England. In

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<sup>1</sup> 2 *Early Records of the Town of Providence*, 113.



testimony whereof, we the said Gen: Assemb: have hereunto set o' hands & Seale, the 14th of March 1648 Portsmouth John Warner Clerke of the Assembly."<sup>1</sup>

Nor can it be claimed that the effect of granting a charter to each one of these four towns at this meeting of the first general

<sup>1</sup> Letters in italics are missing, and have been supplied from a transcript made for the town in 1800.

The Warwick act was as follows:—

"Whereas by virtue of a free and absolute Charter of civill incorporation, granted to the free inhabitants of this Colony or Province by the right honourable Robert Earle of Warwicke, Governour in Chiefe with the rest of the honorable Commissioners, bearing date the fourteenth day of March in the year one thousand six hundred and forty three, givinge and granting full power and authority unto the sayd inhabitants to govern themselves and such others as shall come among them; as also to make, constitute, and ordayne such lawes, orders and constitutions, and to inflict such punishments and penalties, as is conformable to the Laws of England, so neare as the nature and constitution of the place will admit; and which may best suit the estate and condition there; and whereas the sayd towns of Providence, Portsmouth, Newport, and Warwick are far remote each from other whereby so often and free intercourse of helpe in desidinge of differences and trying of causes and the like, cannot easily and at all times be had and procured as in this kind is requisitt; Therefore, and upon the petition and humble request of the freemen of the Towne of Warwicke exhibited unto this present session of General Assembly, wherein they desire freedom and liberty, to incorporate themselves unto a body politicke etc. Wee the sayd Assembly havinge duly weighed and seriously considered the premises and beinge willinge and ready to provide for the ease and liberty of the people have thought fit and by the authorite aforesaid and by these presents doe give, grant, consigne and confirm this present charter to the sayd inhabitants of the Towne of Warwicke, allowing, orderinge and hereby authorizing them or the maior part of them from time to time to transact all such Town afayers as shall fall within the verge, liberties and precincts of the sayd town; and also to make and constitute such particular orders, penalties and officers as may best suite with the Constitution of sayd Towne and Townshippe for the well ordering and goveringe thereof; provided the sayd lawes constitutions and punishments for the civil government thereof be conformable to the Lawes of England, so far as the nature and constitution of that town will admit; and to that end we doe authorize them to erect a Court of Justice and do give them power to execute such particular orders and penalties, and so many of the common lawes agreed in the Generall, and their penalties as are not annexed already to the General Court of Tryalls; and further we do hereby order the sayd town to elect and engage all such officers as shall be necessary for the propagation of Justice and judgement therein, upon the first Monday in the Month of June annually forever hereafter: shall engage them in fidelity to maintaine the honor, crown and dignity of the State of England as loyal subjects thereofe to the utmost of their power, the liberties and freedom of this Collony and the privileges of the town wherein they bear office, and further wee do hereby invest and authorize the sayd officers so elected and engaged with full power to transact in the premises and in so doinge shall be hereby secured and indemnified.

"Given at Portsmouth at the General Assembly, there held this 14th day of March anno. 1648.

"JOHN WARNER,  
Clerk of the Assembly.

"Copia Vera sicut attestat JOHANNES GREBNE, Secretaris ex civitate Warwick."  
(Fuller, Hist. Warwick, 32.)

assembly was, that the four towns surrendered all their original powers to the colony, and, receiving the charters from the colony, continued afterwards to exercise their original powers under the grant from the colony. Cooley meets this well when he says: <sup>1</sup> "What the colony did was only to confer charters, under which the town authority would be administered within agreed limits, and possibly with more regularity than before."

Certainly these charters contain nothing that would confirm the theory that the general assembly had all powers, and the town had only such powers as the general assembly conferred upon it. While power is reserved to the general assembly to pass general laws ("so to dispose the general government of that plantation as it stands in reference to the rest of the plantations as they shall conceive, from time to time, most conducing to the general good of the said plantations"), the freemen of the town of Providence are incorporated, with power, as formerlye "to governe and rule themselves and such others as shall hereafter inhabit within any part of the said plantation, by such a form of civil government as by voluntarie consent of all, or the greatest part of them, shall be found most sutable to their estate & condition," that is to say, in their own affairs they were to continue, as of old, to govern themselves. This, they and all the other towns in Rhode Island have ever continued to do and still continue to do, save for the instances, or attempts at instances, on the part of the political machine possessing the power in the general assembly to pass laws that would infringe upon these powers of local self-government.

It is noteworthy, also, that the power of the town over its own local courts was acknowledged and continued by this charter. The town was "to make & ordain such Civill orders & constitutions & to inflict such punishments upon transgressors; & for execution thereof & of the Comon Law of the Colony agreed unto, & the penaltyes & so many of them as are not añexed already unto the Colony Court of Tryall to make & displace Officers of Justice as they, or the greatest part of them, shall by free consent agree unto, provided nevertheless," . . . &c.

Nor can it be claimed that here is a new grant of powers by the colony to a town that obtained these powers only by this grant. On the contrary, this charter is but a confirmation of powers the town already had, before the colony was in existence, and which therefore it in no wise derived from the colony.<sup>2</sup>

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<sup>1</sup> In *People v. Hurlbut*, 24 Mich. 44, at p. 100 (1871).

<sup>2</sup> The following letter, written in 1832 by John Howland, is significant in this con-



The controversy between Rhode Island and Massachusetts over the next town admitted to Rhode Island (Westerly, in 1669) is illustrative of the fact already shown, — that the early towns of Rhode Island were first settled and afterwards admitted to the union. Massachusetts claimed the whole Pequot country by right of conquest, and erected the tract on both sides of Pawcatuck river, which is now the westerly boundary of Rhode Island, into the township of Southertown, and attached it to the county of Suffolk. In 1660 William Vaughn and others, of Newport, bought part of this land, called Misquamicock, afterwards Westerly, of the Indians, and thirty-six settlers from Rhode Island took possession. Upon complaint to the Massachusetts general court from settlers on the east side of Pawcatuck river, a warrant was issued to the constable of Southertown to arrest the trespassers. They were taken to Boston and committed for want of bail. They were tried, sentenced to pay a fine of forty pounds, to be imprisoned until it was paid, and to give sureties for one hundred pounds to keep the peace. Rhode Island denied the right of Massachusetts to the jurisdiction asserted, and a controversy arose between the two colonies. Connecticut joined, ordering the inhabitants of Mystic and Pawcatuck not to exercise authority under commissions from any other colony. In 1663 a house was torn

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nection. A soldier in the Revolutionary war, he settled in Providence after the war was over, followed the humble profession of a barber, and lived to great old age. A self-educated man, he left his mark on the city as the founder and first president of the Providence Institution for Savings, the principal savings bank in the state. In this letter to Rev. James Knowles he said: "You ask me for a copy of the act incorporating the town. I have not searched for it, but intend to. If I had lived in those days I should have opposed receiving such an act from the general assembly. The four original towns made the general assembly, and they could confer no power which was not already possessed by the old towns. New towns might be incorporated, but it was absurd for the old ones to receive authority from their own agents or deputies. We saw and felt the disadvantages of this pretended act of incorporation two or three years ago, when the school bill was discussed and passed. The assembly then claimed the power to restrict the towns from levying taxes for the support of schools, as they said no such power was granted them in their acts of incorporation, and that all the power of the towns was derived from special acts of the general assembly. But the truth is, the old towns had from their first settlement the power to assess taxes for this as well as for other purposes, and they did not relinquish it when they received their corporate powers. The acts of incorporation could not grant or restrict, but only confirm, the powers already existing, which were not contrary to the laws of England." (Stone, *Life and Recs. of John Howland*, 256.) This man understood thoroughly, not from books, but from his practical knowledge derived from a long life under the institutions he wrote about, the Rhode Island ideas about local self-government. He represented what has always been the common understanding of the people of the state, and the entire past history, development, and legislation of the state has voiced that understanding.

down by residents of Southertown because it was claimed to be within the asserted jurisdiction of Rhode Island. William Marble, a deputy from the marshal of Suffolk, bearing a letter to the West-erly settlers on this subject, was arrested, sent to Newport, and confined in prison eleven months. In 1665 a royal commission, appointed to settle these and other controversies, decided that no lands conquered from the natives should be disposed of by any colony unless the conquest was just and the soil was included in the charter of the colony, and that no colony should attempt to exercise jurisdiction beyond its chartered limits. This put an end to the asserted right of jurisdiction of Massachusetts.<sup>1</sup>

May, 1669, the general assembly voted: —

"This Court taking notice of the retorne by the committee, to wit: Mr. John Easton, Mr. Benjamin Smith, James Greene, Edward Smith, Caleb Carr and William Weeden, in reference to the petition or desire of the people inhabiting at Musquamacott and Pawcatuck in the King's Province, to be made a townshipp, it being and lying within this jurisdiction, as by his Majestyes Letters Pattents it may appear, and considering the Power by his Majesty given to this Assembly to order and settle townes, cityes and corporations, within this said Jurisdiction, as shall seem meet. \* \* \* Be it therefore enacted by this Assembly, and by the authority thereof that \* \* \* shall be knowne and called by the name of Westerly; and shall be reputed and deemed the fifth town of this Collony: and shall have, vse and enjoy all such priviledges, and exercise all such methods and formes for the well ordering their towne affaires as any other towne in this Collony may now vse and exercise: and they shall have liberty to elect and send two Deputyes to sitt and act in the Genneral Assemblys of this Collony from time to time \* \* \* ." <sup>2</sup>

The settlement of Block Island, its history and incorporation as New Shoreham, the sixth town, still further illustrates this.

At first under the jurisdiction of Massachusetts, it was granted to Governor Endicott and three others, in 1658, as a reward for their public services. They sold it in 1661 to Simon Ray and eight associates, who began a settlement there in 1662, liquidated the Indian title subject to a reservation in favor of the natives, and set apart one sixteenth of the land for the support of a minister forever. One Dr. Alcock also claimed title to the island, by purchase of "some in Boston (who took upon them power never granted them to sell it)." <sup>3</sup> Under the charter of 1663 Block Island became a part of Rhode Island. In 1664 it was

<sup>1</sup> 1 Arnold, Hist. R. I. 276, 282, 316.

<sup>2</sup> 2 R. I. Col. Recs. 250, 257

<sup>3</sup> 2 Ib. 128.



"Resolved by this Assembly: That the Governor and Deputy Governor be desired to send to Block Island to declare unto our friends the inhabitants thereof, that they are vnder our care, and that they admit not of any other to beare rule over them but the power of this Collony."<sup>1</sup>

Petitions were presented to the general assembly in 1664 by the inhabitants of the island, for admission as freemen of the colony. They were referred to a committee which reported a letter that was sent, and may be found in 2 R. I. Col. Recs. 53, setting forth in detail how the inhabitants are to be admitted and sworn in as freemen of the colony. November 6, 1672, the island was incorporated as New Shoreham, "as signs of our unity and likeness to many parts of our native country." The act<sup>2</sup> expressly recognizes their existing form of government and continues some of its features. This is still the law.

Although under the jurisdiction of Rhode Island since 1663, Block Island continued to govern itself in all matters until 1672, and the act incorporating it well deserves study from the light it throws upon the way in which this little isolated community had worked out its own system of government, retained part of it when it was incorporated, and has continued to exercise it ever since, even gaining admission of its established right to exemption from military duty ("until otherwise prescribed by law") in Art. XIV., Sec. 4, of the constitution of 1842, still in force.

By the act of incorporation the inhabitants were required

"To meete four times in the yeare for their said towne affaires, for the making of such order or bye laws as may be needfull for their better management of their affaires among themselves according to their constitution, not opugninge the lawes of his Majestie's realme of England, his patent, nor the laws of this colony, agreeable thereto."

On account of the distance by sea, so that often the inhabitants could not reach the mainland "because of danger and hinderings divers ways," the wardens were empowered, following their custom already established before their incorporation, "to hold pleas of actions of account, debt, detinue, trespass and of the case to the value of five pounds sterling of New England money," \* \* "and to proceed in the said actions according to the lawes of his Majestie's realme of England (so farr as the constitution of the place will admitt) and according to due forme of lawe in this Collony agreeable thereto."

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<sup>1</sup> 2 R. I. Coll. Recs. 32.

<sup>2</sup> Ib. 55, 466-470.

"The remoteness of the island rendered it almost independent of the colony, and produced a different system from that which prevailed in the other towns."<sup>1</sup>

The wardens of New Shoreham still join persons in marriage in the town, a privilege not enjoyed in any other town in the state.

It is evident this town was not the creature of the state, but came into it with established powers of its own that it still continues to enjoy.<sup>2</sup>

King's Towne, afterwards Kingston, now North and South Kingstown, the seventh town, was settled in 1641. In October, 1674, it was

"Voted by the King's authority in this Assembly, it is approved the General Councill's acts in obstructinge Connecticutt Colony from useinge jurisdiction in the Narragansett country and the Councill's establishing a towneshipp there, and the calling it Kingstown, with liberty as hath been granted to New Shoreham; \* \* \* \* and that futurely it shall be lawfull to summons as many of our inhabitants as they see cause to attend at Narragansett to oppose Connecticut from useinge jurisdiction there: but not in any hostile manner, or to kill or hurt any person."<sup>3</sup>

In 1679 it was

"Voted, the Recorder shall draw forth the copy of the act of the Generall Assembly in October, 1674, concerninge the confirming of the act of the Generall Council, in establishing a towneshipp in Narragansett, and calling it King's Towne, which shall be sent to the inhabitants there, under the seale of the Collony."<sup>4</sup>

East Greenwich, the eighth town, was incorporated in 1677. This would seem to be the first town that was incorporated first and settled afterwards.

Arnold, p. 428, says: —

"A tract of five thousand acres was laid out in two parts, one of five hundred acres on the bay, for house lots, and the remainder in farms of ninety acres each, and distributed among fifty men, who were now incorporated as the town of East Greenwich."<sup>5</sup>

At p. 588 it declares: —

"And to the end that the said persons and their successors, the proprietors of the said land from time to time, may be in the better capacity to manage their public affairs, this Assembly doe enact and declare that the said plantation shall be a towne, by the name and title of East Green-

<sup>1</sup> 1 Arnold, Hist. R. I. 304.

<sup>2</sup> 2 R. I. Col. Recs. 525.

<sup>3</sup> See the act, 2 R. I. Col. Recs. 586.

<sup>4</sup> Gen. Laws R. I. cap. 191, sec. 8.

<sup>5</sup> 3 R. I. Col. Recs. 55.



wich, in his Majesty's Collony of Rhode Island and Providence Plantations, with all rights, libertys and priviledges whatsoever unto a towne appertaininge."

Jamestown, the island the Indian name of which was Quononoquitt (now Conanicut), was incorporated as the ninth town, in 1678, although it was settled before then. The record is very brief: —

"Voted, that the petition of Mr. Caleb Carr and Mr. Francis Brinley, on the behalfe of themselves and the proprietors for Quononoquitt Island to be made a township, shall be first adjetated and debated.

"Voted, That the said petition is granted; and that the said Quononoquitt shall be a township, with the like priviledges and libertyes granted to New Shoreham."

Some of the peculiar features of its town government are still preserved, protected by law. It still elects its wardens, whose "warden's courts" have the same jurisdiction as the district courts in other parts of the state.<sup>1</sup>

No further change as to towns took place until 1730, when "an act for erecting and incorporating the outlands of the town of Providence into three towns" was passed. Smithfield, Scituate, and Glocester were thus incorporated; and, in language almost identical with that cited above in the acts incorporating the previous towns, it was enacted "and that the inhabitants thereof from time to time (in the case of Glocester 'for the time being') shall have and enjoy the like benefits and privileges (or liberty) with other towns in this colony, according to our charter (or agreeably to our charter — or by our charter do)."<sup>2</sup>

These citations are enough to sustain our contention that as new towns were incorporated they were granted the same benefits, privileges, and liberties that were enjoyed by the four original towns or colonies that existed before there was any united colony, and that they came into that united colony with certain well-established rights, one of which was the right to manage their own local affairs.

Discussion upon the referendum and the initiative is in vogue, but not even Oberholzer in his work on the subject calls attention to the fact that it was in Rhode Island in 1647, when the four already existing colonies organized under the parliamentary charter of 1643-4, the referendum was first introduced. The matter is of such importance as to require, for full understanding, the citation of the legislation adopted.

<sup>1</sup> Gen. L. R. I. cap. 228, § 24.

<sup>2</sup> R. I. Col. Recs. 442.

"7. It was unanimously agreed, That we do all owne and submit to the Lawes, as they are contracted in the Bulke with the Administration of Justice according thereto, which are to stand in force till the next Generall Courte of Election, and every Towne to have a Coppie of them, and then to present what shall appeare therein not to be suitable to the Constitution of the place, and then to amend it."<sup>1</sup>

That is, whatever law of the general assembly was found not to conform to the constitution of compact or agreement of each town was to be amended. The freemen of the towns were jealous of their town rights, and took this means to preserve them.

"11. It is ordered, that all cases presented, concerning General Matters for the Colony, shall be first stated in the Townes, Vigd't, That is when a case is propounded. The Towne where it is propounded shall agitate and fully discuss the matter in their Towne Meetings and conclude by Vote: and then shall the Recorder of the Towne, or Towne Clerke, send a copy of the agreement to every of the other three Townes, who shall agitate the case likewise in each Towne and vote it and collect the votes. Then shall they commend it to the Committee for the General Courte (then a meeting called), who being assembled and finding the Major parte of the Colonie concurring in the case, it shall stand for a Law till the next Generall Assembly of all the people, then and there to be considered whether any longer to stand, yea or no: Further it is agreed, that six men of each Towne shall be the number of the Committee premised, and to be freely chosen. And further it is agreed, that when the General Courte thus assembled shall determine the cases before hand thus presented, It shall also be lawful for the said General Court, and hereby are they authorized, that if vnto them or any of them some case or cases shall be presented that may be deemed necessary for the public weale and good of the whole, they shall fully debate, discuss and determine y<sup>e</sup> matter among themselves: and then shall each Committee returning to their Towne declare what they have done in the case or cases premised. The Townes then debating and concluding, the votes shall be collected and sealed up, and then by the Towne Clarke of each Towne shall be sent with speed to the General Recorder, who, in the presence of the President shall open the votes: and if the major vote determine the case, it shall stand as a Law till the next General Assemblie then or there to be confirmed or nullified."<sup>2</sup>

It is believed that in this statute is found the earliest known instance of the initiative and referendum, now so much admired in the Swiss constitution.

Arnold<sup>3</sup> says: —

<sup>1</sup> 1 R. I. Col. Recs. 147.

<sup>2</sup> *Ib.* 148.

<sup>3</sup> 1 Hist. R. I. 203.



"The mode of passing general laws was then prescribed and deserves attention for the care with which it provides for obtaining a free expression of the opinions of the whole people. All laws were to be first discussed in the towns. The town first proposing it was to agitate the question in town meeting and conclude by vote. The town clerk was to send a copy of what was agreed on to the other three towns, who were likewise to discuss it and take a vote in town meeting. They then handed it over to a committee of six men from each town, freely chosen, which committee constituted the General Court, who were to assemble at a call for the purpose, and if they found a majority of the colony concurred in the case, it was to stand as a law, 'till the next General Assembly of all the people,' who were finally to decide whether it should continue as law or not. Thus the laws emanated directly from the people. The General Court had no power of revision over cases already presented, but simply the duty of promulgating the laws with which the towns had entrusted them. The right to originate legislation was, however, vested in them, to be carried out in this way. When the court had disposed of the matters for which it was called, should any case be presented upon which the public good seemed to require their action, they were to debate and decide upon it. Then each committee, on returning to their town, was to report the decision, which was to be debated and voted upon in each town; the votes to be sealed and sent by each town clerk to the General Recorder, who, in presence of the President, was to count the votes. If a majority were found to have adopted the law, it was to stand as such till the next General Assembly should confirm or repeal it. The jealousy with which the people maintained their rights, and the checks thus put upon themselves in the exercise of the law-making power, as displayed in this preliminary act, present most forcibly the union of the two elements of liberty and law in the Rhode Island mind."

The law stood thus until 1650, when the following act was passed:—

"Whereas, by the powre of the last General Assemblie for election, held at Newport in May last, where, by authority, an act was then established, that the Representative Committee should have the full powre of ye Generall Assembly; and who, when being lawfully mett, and orderly managed, did toward the latter end of that sessions, enact and give order for a new election of another representative, to assemble and sit with the like authoritié in October following: the which being accordingly now assembled and orderly managed, do by the authority and powre of the said ordinance, in the name and powre of the free people of this State, enact these lawes following.

"It is ordered that from henceforth the representative committee being assembled and having enacted law or lawes, the said lawes shall be returned within six dayes after the breaking up or adjournment of that

Assemblie; and then within three days after the chiefe officer of the Towne shall call the Towne to the hearing of the Lawes so made; and if any freeman shall mislike any law then made, they shall send their votes with their names fixed thereto vnto the General Recorder within tenn dayes after the reading of thoss lawes and no longer. And if itt appeare that the major vote within that time prefixed, shall come in and declare itt to be a nullity, then shall the Recorder signifie it to ye President, and the President shall forthwith signifie to ye Townes that such or such lawes is a null, and the silence to the rest shall be taken for approbation and confirmation of the lawes made: and it is ordered further, that the eleventh lawe made at Portsmouth, May 20, 21 — 1647 is repealed."<sup>1</sup>

In 1658 the law was changed, as follows:—

"12. Whereas, it is conceived a wholesome liberty for the whole or major parte of the free inhabitants of this collony orderly to consider of the lawes made by the Commissioners' Courts: and upon finding discommodity in any law made by the sayd court, then orderly to show their dislike, and soe to invalid such a law.

"It is therefore ordered and declared by this present Assembly, that from henceforth the Generall Recorder upon [such] pennalty as shall be Judged meete by a court of commissioners, shall send in to each towne a coppie of the lawes that are made at such courts, soe as they may be delivered to the Town Clarke of each towne within ten daies after the dissolution of each court from time to time; and then the townes to have tenn daies time longer to meete and publish the sayd lawes, and to consider of them. And in case the free inhabitants of each towne, or the major parte of them doe in a lawfull assembly vote down any law, and seale up the voates, and send them to the Generall Recorder within the sayd tenn daies: and that by the voates it doth appeare that the major parte of the people in each towne have so dissalowed it, then such a law to bee in noe force; and otherwise if that bee not soe done within the twenty daies after the dissolution of each court, then all and every law to be in force: And however all to be in force that are not soe disannulled, and the townes shall pay the charge of sendinge the foresayd coppies. Further, the Recorder is to open the sayd voates before the President, or in his absence, before the Assistant of the Towne where the Recorder lives, and then the President or such Assistant to give notice to the rest of the majestrates."<sup>2</sup>

This allowed ten days for the recorder to furnish each town clerk with a copy of the acts of the session, and ten more for the towns to consider them, and, if they disapproved them, to notify the president and thus to annul the statute. The provision that any

<sup>1</sup> 1 R. I. Col. Recs. 228.

<sup>2</sup> *Ib.* 401.



law not so disannulled was nevertheless to go into effect, marked, however, the beginning of the decline of this peculiar system. Had it been provided that no law of the general assembly was to go into effect until approved by the towns, the system would have been more permanent.

In 1660 this was amended, as follows: —

“Whereas, there is a certayne clause in a law made at Warwick, November the 2d 1658, touching the people's libertie to disannull any law to them presented from the Courts of Commissioners, as there is premised: by which clause it seems the priviledges are not soe clearly evinced as the Commissioners thereby and therein did intend in formeinge the same law, in regard of this clawse (that the major parte of each Towne in the Collony must send in their voates of their towne to the Generall Recorder, to disallow any law that should be soe presented, within tenn daies after it is presented to the Towne, if they conceiue such, or any such law not wholesome). It is therefore ordered, by the authority of this present Assembly, that the aforesaid clause be rectified, and that instead thereof it be enacted, and it is hereby enacted, that there be three months time, that is to say, fowre score and six daies allowed for the returne of the voates from each towne unto the General Recorder after that such lawes be presented (in such order and time as by the foresayd law is provided) to each towne:

As alsoe wee further enact that it apearinge by the returne of the voates, that the major parte of the free inhabitants of this Collony have disapproved or disannulled any such law or lawes, then the sayd law or lawes to be of noe force; although any one towne or other should be wholly silent therein, or otherwise such law or lawes to be in force according to the true intent of the other parte or clause in the above sayd law of November the 2d 1658; and this foresayd addition to stand and be in full force, any law or lawes, or any clawes or clawes in any former law contayned, to the contrary notwithstanding.”<sup>1</sup>

Besides allowing more time to disannul a law (three months instead of ten days), a majority of all the votes in the colony was substituted in the place of a majority in each town. This was a great step towards consolidation of the united government.

The new charter was obtained in 1663, but it made no change in the relation of the towns to the colony. In 1664: —

“It is ordered and inacted by this Assembly. That whereas ther are severall lawes extant amongst our former lawes inconsistent with the present Government, as houlding of Courts of Commistions, and repealing of the acts of the General Assemblies by votings in town meetings:

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<sup>1</sup> 1 R. I. Col. Recs. 429.

together with several other of licke natuer, which are contradictory to the forme of the present government, erected by his Majestyes gracious letters pattent, that all such lawes be declared null and voyd, and that all other lawes be of force vntil some other course be taken by a Generall Assembly for better provition heerein: and further, wee declare, that all obligations formerly taken to the Court of Trialles to be houlden in Newport, the second Tusday of this instant, March, be of full force and vertue to make each parson responsible to the sayd court."<sup>1</sup>

It is to be noticed that, although this act annulled the laws under which the towns could annul the acts of the general assembly, it was silent as to those laws under which the towns could initiate new laws. They would seem to have become extinct merely through non-use. It would seem, also, that the act was intended to be provisional only ("vntill some other course be taken by a General Assembly for better provition herein)." "From these provisions," says Governor Hopkins, "came the common story, that some towns had heretofore repealed acts of the general assembly."<sup>2</sup> This remark shows that at the time Governor Hopkins wrote, the people had forgotten what the original powers of the towns were.

We find, therefore, that the power of the freemen of the towns to annul the laws passed by the general assembly lasted through the life of the first charter and was not abolished until after the adoption of the second charter, while the power of the freemen of the towns to initiate legislation has never been formally abolished, but is only lost through non-use. It is evident that the original towns or colonies of Rhode Island possessed governmental powers of their own before there was any united colony; that they formed the colony, subsequently the state, and gave up some of their powers to it; that new towns were settled and admitted to the union upon the same footing as were original towns, with all the rights, powers, and duties of the four original towns; that little by little the power of the colony, afterwards the state, has increased and that of the towns has diminished; that this has been done with their consent; but among the rights still reserved to the towns and cities of this state are the right of existence and the right to manage their own local affairs, free from the interference or control of the general government except through the exercise of its undoubted power to pass general laws applicable to all alike.

*Amasa M. Eaton.*

[To be continued.]

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<sup>1</sup> 1 R. I. Col. Recs. 27.

<sup>2</sup> 7 R. I. Hist. Colls. 45.



## CONCENTRATION AND INTERNATIONAL LAW.

THE tendency towards concentration which is the marked characteristic of the age is no new phenomenon. It is the logical outcome of a certain line of development. In the first application of the principle of division of labor in its most rudimentary form was concealed the germ which has developed into what seems almost a revolution of business methods. Commercial evolution has gradually developed the system of centralized control by carrying to its logical conclusion the principle of division of labor.

Division of labor is perhaps from a certain standpoint a somewhat misleading term. It suggests a scattering rather than a concentrating process. Division of labor really concentrates into the hands of a class some one commercial function, and gives each class so much greater experience, skill, and so improved implements, that the production and exchange of commodities are effected with the minimum of waste. Take for instance a community where each man makes his own shoes. With the introduction of division of labor, shoemaking is concentrated into the hands of a class of shoemakers. Carry the division of labor farther and you have each process in the manufacture of a shoe concentrated in a body of workmen who do nothing but that one process, and attain great skill by a constant repetition of the same act.

Division of labor in manual and mechanical processes to-day excites no unusual attention, but an extension of the principle to the managing department has created alarm. The modern consolidation of industries is but an extension of division of labor to the function of the manager or *entrepreneur*. A smaller body of men now undertakes to do what was formerly done by a large number of independent industries. The new *entrepreneurs* are experts who have at their command the most improved implements, and we already begin to see the elimination of waste and the greater efficiency of labor which are characteristic results of every extension of division of labor.

It is curious to note that the tendency towards consolidation is not confined to commercial affairs. It seems to be a great evolutionary law. The same tendency is apparent in the concentration of

political power. In the earliest stages of man's development the individual was the political entity, — a law unto himself. Individuals combined into tribes; tribes formed permanent settlements; cities arose; kingdoms were founded; kingdoms were merged into nations, — all these concentrating processes. In the Middle Ages Germany was divided into twelve hundred independent states, and similar political subdivisions existed in most European countries. The present century has seen the welding of more than one nation; the consolidation of Austria, of Italy, of Germany, illustrate this fact. To-day the nation is the nominal political entity. But the most cursory glance over the history of the last hundred years will show that the concentrating process is still going on, and that political control has passed into the hands of the six Great Powers of Europe. England, France, Germany, Austria, Russia, and, since 1867, Italy have claimed and have exerted control over the foreign affairs of Europe, and have even interfered in the internal affairs of independent states. The erection of Belgium into a kingdom and its neutralization; the neutralization of the Suez Canal, of Switzerland, and of Luxembourg; the various attempts to settle the Eastern question; the erection of Egypt into a semi-sovereign state, — will sufficiently illustrate the magnitude and the importance of the political control which is exerted by the Great Powers. But it would seem that of the six Great Powers not more than three, England, Germany, and Russia, are destined to maintain their dominant position. France's future is problematic; her population is stationary and she is not a good colonizer; a nation, like every other living organism, must grow or die. Italy is a Great Power only by virtue of an express invitation to join the Powers in 1867. Austria is threatened with disintegration on the death of the present Emperor. The concentrating process is thus being carried to a still higher point. Instead of six Great Powers, we may expect to see only three in Europe. In the Western hemisphere the United States practically exerts a primacy equivalent to the control of the Great Powers in the Eastern. The political entity is therefore fast becoming something beyond the nation, something approaching perhaps a Council of the Great Nations as representing the family of nations, or "a Committee, a body of representatives of the leading states," as Lawrence puts it. At any rate, the principle of concentration of power is there, and is working out its evolution.

This concentration of political power cannot fail to have a marked effect on International Law. International Law is



founded on usage and on express agreement. Agreement to a rule of conduct is expressed by the signing of a treaty or declaration at a convention called for that purpose. A custom or an agreement observed by the dominant powers is virtually binding on the lesser powers. Assent to a new rule is always more readily obtained where the number of the parties interested is small, and the fewer the nations whose consent is vital, the more likely a question is to receive international sanction. When it lies within the power of four nations to make rules which shall be observed by the family of nations, we may expect to see a great extension of the rules regulating the conduct of states with one another. The dominant states have it in their power to originate and to confirm usage as well as to put into operation new laws, and thus to add by custom to the body of International Law. If, for instance, the Great Powers and the United States should always submit a certain class of cases to the Board of Arbitration suggested at the Peace Conference, it would soon become customary to submit such cases to arbitration.

A custom which is adhered to for a certain length of time is a tacit agreement, and becomes as binding as a written agreement or a law. The United States to-day is as much bound not to issue letters of marque to privateers as though she had signed the Declaration of Paris in 1856. A custom is often stronger than a law. It would probably be easier to repeal a law making residence a necessary qualification for a representative office than to break down the custom which, in this country, obliges a representative to live in the district which he represents. So that the right to initiate international customs which are practically binding on the smaller nations, as well as to make international agreements, puts immense power into the hands of the dominant powers.

A law, however, which can be violated with impunity by the strong, can hardly be called an effective law. There are only two ways to-day of enforcing international agreements or international customs, — by war or by the force of public opinion. The first step has been taken towards substituting law for force, namely, the inauguration of a system of International Arbitration. The most sanguine can hardly look upon what was accomplished by the Peace Conference as more than evidence of a tendency. An International Court of Arbitration would undoubtedly at first draw its strength from the power of public opinion; it is inconceivable at the present stage of development that an interna-

tional body of troops should be maintained to enforce the decrees of such a court. But decrees enforced by public opinion would soon become customs, and laws arise from customs. Even a custom to appear before the court would do away with a great number of causes of conflict, and an enlightened public opinion may as readily, perhaps, enforce an appeal to the court as it does the observance of the neutrality of the hospital corps at sea. The world is fast being partitioned, and when territorial boundaries are permanently defined—as they may well be soon, so rapid is the march of events nowadays—a fertile source of international contention will be done away with, and nations will be more ready to see what their common interest is.

What is the stage of political development which is to succeed the present one, where the nation is the political entity? To what is the concentrating process which is still going on tending? The concentration of power seems to point to some new entity more compact than scattered nations. May it not be some form of a republic of nations with a well-developed body of laws, a Congress by which new laws shall be made, and a tribunal to whose laws the component nations submit, very much as the states of the United States submit to the Federal law,—in other words, a government by consent of the governed; with each nation supreme in its internal affairs, and limited in power only in its international relations? The extension of International Law, the establishment of an International Tribunal, the concentration of power into the hands of a few great nations, the absorption of the lesser nationalities into the greater, the consolidation of interests in every domain of life, the growth of republican institutions, seem to point to some such outcome. The concentrating process is necessary to attain this result. Whether, when once a really effective body of laws governing the relations of nations—one that can be enforced—has been established, a process of disintegration will then set in and great nations will again be resolved into small ones, no man can tell. It is beyond the range of our vision until more definite tendencies appear.

*Grafton Cushing.*



# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

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CONSTITUTIONALITY OF THE MASSACHUSETTS LAND REGISTRATION ACT.  
—The Torrens system of land registration has been in force in South Australia since 1856, in England since 1875, and later in several of the English colonies. Few landowners in England have taken advantage of it, — so that the introduction of it in Massachusetts by the Land Registration Act (in effect October 1, 1898) is an experiment. The system under that act attempts to provide for commercial certainty and commercial despatch in dealing with land titles. It provides that a landowner may, if he wishes, set in motion an examination of his title which, if satisfactory, will end in a registration of that title final against all the world. Adverse claims if presented are judicially tried, but notice of proceedings comes to possible claimants only as follows: if their addresses are known, by mail; if known by name, by publication in some newspaper of the district; and to the unknown and known, by conspicuous notice on the land.

In *Tyler v. Judges of the Court of Registration*, 55 N. E. Rep. 812 (Mass.), the system was held to be "due process of law" within that clause of the Massachusetts Bill of Rights and the Fourteenth Amendment. "Due process," as Mr. Justice Holmes says, refers to "some-what vaguely determined criteria of justification which may be found in ancient practice, *Murray v. Hoboken Land Co.*, 18 How. 272, or which may be found in convenience and substantial justice though the form is new, *Hurtado v. California*, 110 U. S. 516." An act offends against "due process" only when it has the aspect of an encroachment on individual rights which may not be justified, rationally, on the ground that it is for the public good. There must be the aspect of arbitrariness. The question then substantially is, has this innovation bitten so deeply into the real property law as to be considered arbitrary. Before this act, under our systems of law, a claimant desiring certainty of title could

attain it only through the lapse of time, or by some statutory proceedings which needed the lapse of time to fortify it against collateral attack. And, again, he could bring other claimants into court only by regular personal service of process—at least if those other claimants were within the jurisdiction. The general method of procedure under this act is then novel—yet it is substantially the ordinary proceeding in actions *in rem*, as in admiralty. The act reorganizes a certain section of the law, provides an abbreviated way of settling certain controversies. It is quick, cheap, convenient, substantially fair—novel but not arbitrary. It would, it seems, be greatly to be regretted and most surprising if such an experiment in law-making may not be tried. The constitution clearly was not intended to crystallize the form of law. The Massachusetts court decided the case along such lines, and any attempt to reduce the question to petty and unstatesmanlike proportions—the case of *State v. Guilbert*, 56 Ohio St. 575, on the same question is typical of the modern attitude of many—is to be deprecated.

Two objections to the act, from the point of view of the public, suggest advisable amendment. First, the notice seems often inadequate, the publication is infrequent, and the space of time in which registration can be accomplished often short. Second, the act does away with the doctrine of prescriptive rights, and so most boundary blunders—where A has built his house six inches into B's lot, etc.—become incurable.

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FISHING VESSELS EXEMPT FROM CAPTURE.—One of the legal outgrowths of the recent war with Spain is a noteworthy decision in international law. Two fishing vessels, owned by Spanish subjects of Cuban birth, were captured off Havana, were libelled and condemned in the District Court, on the ground that, in the absence of any ordinance, treaty, or proclamation, such vessels were not exempt from seizure as prize of war. A proclamation of the President, published some days before, had announced that the war would be conducted according to the principles of international law, but made no specific exemption of fishing boats. Upon appeal to the Supreme Court, it was held to be a rule of international law, developed gradually from an ancient usage among civilized nations, that coast fishing vessels employed in catching and bringing in fresh fish, together with their cargoes and crews, were exempt from capture. The chief justice and two others dissented, mainly on the ground that this exception was rather an act of grace than a matter of right, and should not be allowed in this case as it was not specially provided for in the President's proclamation. *The Paquete Habana*, *The Lola*, Supreme Court of the United States, October Term, 1899, manuscript.

Upon this question there are not many judicial decisions. The French tribunals, as well as nearly all the authoritative writers on the subject, have long considered the exception as a settled rule of international law. In the leading English case, however, a hostile fishing vessel was condemned; and although this action was in pursuance of a royal decree, Lord Stowell remarked in rendering judgment that the exemption was "a rule of comity only and not of legal decision." *The Young Jacob and Johanna*, 1 C. Rob. 20. Yet that was said a hundred years ago, and the majority in the principal case would seem to be right in the conclusion that what was then only a usage has now crystallized into an acknowl-



edged rule of international law. For it is in just such a way that the development and growth of international law takes place. Indeed, the actual dissent of England would by no means be fatal to the validity of any such rule, for the determining factor of international law is the general consensus of all nations, and not the solitary practice of any one of them. There would seem to be good reason for this exemption of fishing boats, since their seizure would serve merely to deprive poor fishermen of the means of earning their living, and the captor would reap no advantage in return. Such fishing vessels form no appreciable part of the wealth and resources of a nation, and the proceeds of their sale would hardly repay the trouble and expense of their capture and condemnation, for the boats themselves are of no great value, and the cargo of fresh fish is of such a perishable nature as to be almost worthless. Aside from this matter of expediency, there is a strong tendency in the rules of modern warfare toward respecting the rights and property of those of the enemy who are not engaged in actual fighting. The decision in the principal case, therefore, being both reasonable and fully in accord with the natural development of international law, would seem to be entirely sound.

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CLOGGING THE EQUITY OF REDEMPTION. — Whether or not the invention of the equity of redemption was due to "the piety or love of fees of those who administered equity," there is certainly no interest which has been more jealously guarded. To prevent what was thought an infringement of this right, it was early established that a mortgagee should not have a collateral advantage besides interest on the mortgage debt. *Fennings v. Ward*, 2 Vern. 520. After the repeal of the usury laws it was suggested that the objection to a stipulation for a collateral advantage disappeared with them, but in *Broad v. Selfe*, 11 W. Rep. 1036, the court held that though the principle in its origin probably had reference to the usury laws, it went beyond them and was not affected by their repeal. This was affirmed in a number of cases and regretfully admitted to be law by Lord Bramwell in *Salt v. Marquess of Northampton*, [1892] App. Cas. 1. But in several minor details the rule had been broken in upon, as in *Mainland v. Upjohn*, 41 Ch. D. 126, and more notably in the West India mortgages, *Bunbury v. Winter*, 1 Jac. & W. 255. The first marked departure, however, from the spirit of the old cases in the direction of allowing freedom of contract was not till *Biggs v. Hoddinott*, [1898] 2 Ch. D. 307. It was there stipulated that the mortgagor should for a term of years buy all the beer he used in his public house from the mortgagee. The court sustained the stipulation on the ground that it did not clog the equity of redemption, as damages for the breach of the covenant were not covered by the security. Once having taken the step that a collateral advantage not expressly forbidden by any previous decision was, in the absence of fraud, allowable, it was very easy for the court to go further, since it was impossible to reconcile this case with the former cases on any satisfactory principle. The decision in *Sautley v. Wilds*, [1899] 2 Ch. D. 474, was therefore not wholly unexpected. In this case the mortgagee of a lease stipulated, besides interest, for one third of the net profits from any subleases, and that the relation of mortgagor and mortgagee should subsist for this purpose during the entire term of the lease, though the principal was to be paid off before its end. There being no evidence of fraud or overreaching, the stipulation was held valid.

This decision reaches the satisfactory result of entirely abolishing the troublesome rule against collateral advantages. Since the repeal of the usury laws with the consequence that in the absence of fraud or oppression there was no limit to the rate of interest that might be charged in a mortgage, no sound reason remained for its retention. A stipulation for a collateral advantage it would seem could no more be considered a clog on the equity of redemption than could an increase in the rate of interest. Redemption in both cases would be made more difficult, but the right to redeem on the performance of the agreement would always remain. That this right could not be exercised for a limited period is no objection, as provisions of that nature have always been allowed. The rule of the principal case, that a stipulation is invalid only when repugnant to the continuance of the instrument as a mortgage, has the advantage of simplicity and of conforming to the modern tendency to allow freedom of contract. Though a conspicuous instance of judicial legislation, the case will probably be followed.

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JURISDICTION IN GARNISHMENT OF DEBTS. — What jurisdictional facts are necessary to give validity to proceedings in the garnishment of a debt is a question difficult of solution in the actual state of the authorities. It may be stated generally that the trend of decision declares that a debt has, for the purposes of attachment, a *situs*, and that this *situs* must be within the jurisdiction of the court where relief is sought. Within this general rule there is a marked conflict of opinion where this *situs* is to be found. The prevalent view would seem to be that the *situs* of a debt for the purposes of garnishment is at the domicile of the debtor, the garnishee. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710; *Nichols v. Hooper*, 17 Atl. Rep. 134 (Vt.). The *situs*, however, may be at the domicile of the creditor; of course, to attach the debt there must also be service of process on the debtor, who accordingly must be capable of being reached at the creditor's residence. *Louisville & N. R. Co. v. Nash*, 23 So. Rep. 825 (Ala.). Again, if the debt is a judgment debt it can only be seized at the place where the judgment was rendered, provided as before service of process can be had on the garnishee. *Noble v. Thompson Oil Co.*, 79 Pa. St. 354. Still another view, while recognizing that the debt has a *situs*, insists that, wherever the garnishee could be sued by the principal defendant, the creditor, there the debt may be attached. *Wyeth H. & M. Co. v. Lang*, 127 Mo. 242. This far-reaching rule, which conceives of the debtor as carrying the obligation with him wherever he goes, is anomalous and based on no sound reason.

Two recent decisions take different positions, — one regards the domicile of the creditor as material, the other that of the debtor. In *Central of Georgia Ry. Co. v. Brinson*, 34 S. E. Rep. (Ga.), the debtor was a resident, the principal defendant a non-resident, who was not served on personally, and jurisdiction was denied because the *situs* of the debt for the purposes of garnishment is at the domicile of the creditor. In *King v. Cross*, 20 Sup. Ct. Rep. 131, it was held that the garnishment of a resident debtor for a debt due to a non-resident defendant was not void. As a matter of principle it is hard to see how anything incorporeal, without length, breadth, or thickness, such as a debt, can have any *situs*. For some purposes, however, such as taxation and administration, a chose in action is treated as if it had a *situs*. Here, too, attachment is



a case where it must be treated as a chattel. Ordinarily speaking, no court can be said to control the debt and compel the debtor to pay and the creditor to accept payment but the court which has jurisdiction over both those parties. If, however, the debtor and the place of payment be within the jurisdiction, the court may well compel the debtor to pay over and declare a discharge; and only in those two cases can a valid discharge of the debt be decreed. 12 HARVARD LAW REVIEW, 214. In the light of this the actual result reached in the Georgia case would seem correct, since neither the creditor nor the place of payment were within the control of the Georgia court. The point has come before the Supreme Court of the United States twice during the last year, and this is of much practical importance. The decisions following the weight of authority will probably settle the question in this country for the future, — the *situs* of a debt for the purposes of attachment will be at the domicile of the debtor.

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INCORPORATION IN TWO STATES. — The status of a company incorporated in more than one jurisdiction is an anomaly that deserves more scientific treatment than it has yet received. On the usual theory that corporate existence, since created and continued only by force of the sovereign declaration of a state, is limited strictly to the territory of that state, dual incorporation produces two distinct entities in law, when for all business purposes there exists but one. *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 286; *Chic. & N. W. Ry. Co. v. Auditor General*, 53 Mich. 79. And yet in many cases courts have to regard these corporations as units: thus, a stockholders' meeting held in one state according to its charter will be deemed a fulfilment of a similar requirement in the charter of the other state. *Graham v. Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161. For purposes of Federal jurisdiction such corporation is treated as a citizen only of the state originally incorporating. *St. Louis & San Francisco Ry v. James*, 161 U. S. 545.

The problem of unity or duality is avoided where only the incorporating states are involved, for when two charters confer different degrees of power, it would seem that each state must determine the enforceability of contracts made within its borders by its own limitations. When acts of the corporation in third states are in question, however, the problem is of more than mere metaphysical importance, as appears from a recent decision of the St. Louis Court of Appeals. *Martinez v. Probst*, 32 Chic. Leg. News, 166. A benefit society incorporated in Kentucky got another charter in Missouri. Its lodge in Louisiana then contracted with a member for a death benefit payable to one who could take under the Kentucky charter, but not under the Missouri laws. On the death of this member, his heirs sued on this contract in Missouri, claiming that the beneficiary named was not entitled, and the corporation by bill of interpleader brought in the beneficiary and paid the fund into court. The majority opinion held that the intent of the parties was to act under the Kentucky charter; that there was nothing in the policy of Missouri against the enforcement of such contracts; that though in each of the incorporating states the corporation could act only under its local charter, in all other states it may act under either; that the contract was, therefore, enforceable.

To attain this desirable result, it is clear that the idea of dual existence must again be disregarded; for it would be impossible to enforce against

the property of the Missouri corporation a contract made by the Kentucky corporation. This frequent departure from the general rule indicates a failure of the rule to conform to the facts; and, indeed, a common membership, one capital, one system of bookkeeping, a single enterprise, make these corporations to men of business but one company. The difference between re-chartered companies and those acting through agents in foreign states by formal license of the legislature is often hard to determine; and indeed it might well have been deemed only a difference in degree of local privilege. In the present state of the law, however, it would seem that we must here make an arbitrary exception from the fundamental principle that the legal entity created by incorporation has a limited territorial existence or abandon that principle altogether.

MORTGAGES OF AFTER-ACQUIRED PROPERTY. — That a mortgage of after-acquired property is valid in equity has been said to rest on the elementary principle that equity considers as done what is agreed to be done, and therefore raises a trust for the mortgagee as soon as the property is acquired. *Tailby v. Official Receiver*, 13 App. Cas. 523. Perhaps a more satisfactory explanation is that equity gives effect to the mortgage by giving the mortgagee the only remedy of any value under the circumstances, viz., specific performance of the agreement to execute a mortgage on the chattels when acquired. *In re Clarke*, 36 Ch. D. 348. But whatever may be the explanation given, the mortgage is almost everywhere sustained. In several states, however, and notably in Massachusetts, which for a long time had no equity jurisdiction, a mortgage of after-acquired chattels is not recognized. *Chase v. Denny*, 130 Mass. 566. Possibly the rejection of the doctrine by so strong a court as that of Massachusetts influenced the decision in a recent case, — *Ferguson v. Wilson*, 80 N. W. Rep. 1006 (Mich.). A chattel mortgage on certain cattle "and all other personal property which I may own or acquire during the years 1893-1899" was given to the defendant and recorded. The plaintiff claimed under a subsequent chattel mortgage. The court, while admitting that a mortgage of after-acquired property was good in equity, held that the mortgage here was void as having no connection with the property owned by the mortgagor at the time of its execution.

Probably the court means by this restriction to confine the doctrine to securities like a stock in trade. No authorities are cited and no reasons given in support of the limitation. In fact any justification on equitable principles it is difficult to find. The idea that the chattels must be of a specific character was shown in *Tailby v. Official Receiver*, *supra*, to be without any foundation either in principle or authority. The mortgage in the principal case cannot be open to the objection of being too vague, as at the time it is to be enforced the property has come into being, and what is covered by the mortgage is known with absolute certainty. If it be contended it is bad as being too comprehensive, the answer is that wideness has never been held an objection. A covenant on a marriage settlement to settle all the property to which a husband may thereafter become entitled will be decreed specific performance, *Hardey v. Green*, 12 Beav. 182; and there is no doubt but that a mortgage by a corporation of all its after-acquired effects is valid. *Hamlin v. Jurard*, 72 Me. 62. It is not clear why the rule applying to individuals should differ from that governing corporations. In a recent case, *In re Kelcey*, [1899] 2 Ch. D.



530, a mortgage of all the mortgagor's real and personal property was sustained, and on principle there can be no sound distinction as regards invalidity because of wideness drawn between mortgages of present and future interests. The limitation in short would seem not only arbitrary, but, for all that appears, entirely unnecessary.

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A LEGAL ASPECT OF PRAIRIE-FIRES. — In *Owen v. Cook*, 81 N. W. Rep. 285 (N. Dak.), the plaintiff sought to recover damages for injuries to his property alleged to have been caused by fire set by the defendants. The defendants, in order to protect their property from destruction by an approaching prairie fire, had set back-fires, which, together with the main fire, destroyed the plaintiff's buildings. It was held that the defendants were not liable, since in the opinion of the court the case came within the principle of the "squib" case. *Scott v. Shepherd*, 2 W. Bl. 892. The real question there was whether trespass or case would lie against a defendant who had thrown a lighted squib on the property of another. This was tossed along by two intermediate actors, and finally struck the plaintiff Scott. The decision of the court holding that trespass would lie was based on the theory that the acts of the intervening agents did not break the causal connection between the defendants' act and the plaintiff's injury. The danger was conceived to be so imminent as to overpower the reasoning faculties, and produce instinctive or automatic action.

Yet how the principle of that case applies to the present facts is not clear. The exigency did not demand instinctive action nor did the defendants act automatically. It may well be that the court in excusing the defendants were influenced by the *dictum* in the "squib" case that acts done for self-protection under compulsive necessity would not be regarded as acts of a free agent, and hence would not break the causal connection. If this be the application of the principle of *Scott v. Shepherd*, — and no other seems plausible, — it is equally as unjustifiable as the former suggestion. One may not in all cases protect himself at the expense of his neighbor even though the danger be imminent, and to say that compulsive necessity will excuse is to introduce a standard too unstable and too indefinite for a rule of law.

What, then, is the criterion of legal liability in those cases where one in warding off danger from himself forces it on another? The authorities are not explicit. It is said that one cannot justify a deliberate injury of his neighbor's property by claiming that it was done in defence of his own. Pollock, Torts, 4th ed. 162. The same idea is suggested in some cases. In the dissenting opinion of Blackstone, J., in *Scott v. Shepherd*, *supra*, the intermediate agents were considered as acting on their own judgment, hence should have been responsible. So in *Ricker v. Freeman*, 50 N. H. 420, instructions were given that if time for reflection or deliberation were given the actor, legal liability would attach. And in a later case, *Laidlaw v. Sage*, 80 Hun, 550, the essence of liability was said to depend, not on whether an act was voluntary, but on whether it was the result of an intent based on reasoning. So far as these authorities go, then, they seem to recognize a common characteristic in these sudden acts for which one may be liable. That characteristic is the deliberate nature of the act. A deliberate act is one done in the exercise of the reasoning powers. It

is manifest, however, that the length of the period of deliberation can make no difference in the statement of the principle of liability. It therefore seems correct to say that when the act done under stress of circumstances is the result of an exercise of the reasoning faculties, however rapid, the actor is subjected to the ordinary rules of legal liability. 7 HARVARD LAW REVIEW, 302. So the principle of the "squib" case does not apply, for here is not an instance of instinctive action. Since the defendant's act was deliberate, he should not have been excused on the ground that he acted for self-protection under necessity.

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LIABILITY FOR BLASTING. — The precise extent of the liability for damage caused by blasting is doubtful on the authorities. In accord with the view sustained by the weight of authority, that liability attaches irrespective of negligence, is a late decision in New York. In the course of the blasting operations of the defendant upon his own land, a portion of a tree was thrown a distance of some four hundred feet upon the plaintiff's intestate, who was travelling upon the highway, causing her death. A ruling of the trial judge that it was not essential for the plaintiff to establish negligence in order to make out a cause of action was sustained by the Court of Appeals. *Sullivan v. Dunham*, New York Law Journal, Jan. 24, 1900.

On principle it is hard to find any real difference between liability for injuries caused by blasting and for those caused by the accidental explosion of a powder magazine. The distinction that the actual explosion was intentional in the one case and not so in the other is immaterial, as in neither instance was there any intent to cause the resulting damage. Upon the keeper of dangerous explosives absolute liability is imposed only when by reason of the location and surrounding circumstances the magazine is a nuisance. *Heeg v. Licht*, 80 N. Y. 579. If the magazine is not so situated as to cause reasonable fear of injury to those in the neighborhood, the defendant is liable only for injuries resulting from negligence. 13 HARVARD LAW REVIEW, 310. Similarly it would seem that where the locality and circumstances are such that it was not probable that damage would result to the person or property of others from the use of blasting powder, a defendant should be held liable for a consequent injury only if he failed to use due care. If, however, there was an antecedent probability of such damage, the mere act of blasting was such an unreasonable user as to amount to a nuisance. Liability would then attach to any injury proximately caused.

The leading American case on this subject, on the authority of which the decision in the principal case is vested, is *Hay v. Cohoes*, 2 N. Y. 159. Although in that case the facts seem to point to a user so unreasonable as to amount to a nuisance, the court was apparently influenced in their decision by the old theory of absolute liability for trespass; "he that is damaged ought to be recompensed;" a theory which is not generally supported in this country, and which later has been substantially denied in New York. *Losee v. Buchanan*, 51 N. Y. 476. The weight of authority follows *Hay v. Cohoes* in imposing absolute liability irrespective of the degree of danger, yet in the great majority of cases the facts show that there was an actual nuisance; and this might be said even of the princi-



pal case. As blasting is a useful and often a necessary means for the improvement of land, it would seem better to hold that where it does not amount to a nuisance a defendant should be answerable only if negligent. This position, moreover, is not without authority. *Klepsel v. Donald*, 4 Wash. 636.

FOREIGN MARRIAGES — TITLE TO PERSONALTY. — After years of litigation in the English courts, the *De Nichols* will at last has been set aside. This will, which disposed of a personal estate obtained during a long period of English domicile, was disputed by the testator's widow on the ground that, since the marriage had been contracted at the time of their French domicile, by the French law of community of goods she was entitled to one half the personalty later acquired, though there had been no express marriage settlement. Her right was recognized by the Divisional Court, but the Court of Appeal held that the law of the domicile at the time of death gave the husband title to all the personalty. In the House of Lords this decision has now been reversed and the wife declared entitled to one half the personalty on the ground that since the parties contemplated a French marriage, they must be supposed to contract that their marital rights not only to existing property, but to all future acquisitions wherever they may be domiciled, shall be determined by the law governing the marriage. *De Nichols v. Curlier*, [1900] App. Cas. 21. In this country, on the other hand, this precise question as early as 1827 was decided the other way. *Saul's Heirs v. His Executors*, 3 Mart. N. S. 569. This view has been followed consistently. *Muus v. Muus*, 29 Minn. 115; *Long v. Hess*, 154 Ill. 482.

The greater frequency of marriage settlements in European countries than in our own doubtless accounts for this desire of the courts to supply them, when omitted, on what seems to them grounds of obvious justice to a defrauded spouse. Is it not, however, as likely that on change of domicile the parties, in the absence of express agreement, wished to submit all their rights to the law of their new home? This implication of a contract certainly is not in line with any general principle as to the acquisition of property. But two views of the law governing title to personalty have ever been maintained: the law of the domicile of the claimant, and the law of the *situs* of the property. *Green v. Van Buskirk*, 7 Wall. 139; *Re Queensland Co.*, [1891] 1 Ch. 536. In the principal case both these tests would concur to fix on the law of England to determine the rights of the wife. Nor is there any peculiarity in the law of family relations that would lead to this departure. The right of a husband to the society of his wife is governed by the law of the place where they are residing. Dicey, *Conflict of Laws*, 490. Before making an exception to these rules, one may fairly ask for more conclusive reasons than a view of abstract justice, which is at least doubtful.

But even granting the propriety of implying a contract, it should not have been decisive here. The exact question considered in the Divisional Court was; what interest had the plaintiff in the property at the time of the testator's death? In France, the wife would get title to one half the personalty from the moment of acquisition by force of positive law. An English marriage settlement, however, would give the wife no vested legal estate in her husband's personalty. It would be a mere

equity enforceable only through the courts. So this implied contract, wherever made, could not vest title in the wife to personalty acquired by the husband by force of the law of England, but would give merely an equitable claim against his estate.

COMPANY PROMOTERS ARE FIDUCIARIES. — It is common in the commercial world for an owner of property who desires to sell to take an active part in forming a company to purchase his interests. And it usually happens that the promoter himself is made a director of the new company or selects the board. The law makes no attempt to prevent such a sale of property, recognizing that the individual promoter-vendor and the corporate vendee are distinct persons. But in a court of equity the action of the promoter is closely scrutinized, since in the nature of things his interests as vendor and as one of the vendees may clash. The relation between him and the company is therefore regarded as fiduciary. *Erlanger v. Sombrero Phosphate Co.*, 3 App. Cas. 1218. And this was deemed so important that Lord Cairns thought it incumbent on such organizer to provide his company with an independent board of directors whose action might be free and intelligent. It seems unnecessary, however, in all cases to go so far as in *Salomon v. Salomon*, [1897] App. Cas. 22, where all the shareholders knew and approved the terms of sale. There, as the number of shareholders was strictly limited, it was held that the directors might bind the company by a contract with themselves as promoters. See *Alger Promoters*, p. 28. These exceptional cases, however, seem not to have introduced principles inconsistent with *Erlanger's* case. The importance of the fiduciary obligation on the vendor towards the company still remains.

The case of *Lagunas Nitrate Company v. Lagunas Syndicate*, [1899] 2 Ch. 392, therefore seems strangely lenient in this regard. A syndicate owning certain nitrate works formed a company to purchase the property. The board of directors of the two organizations was identical. These facts were noted in the articles of association, but received mere mention in the prospectus given to the public. Yet the court held that the interest of the syndicate was sufficiently disclosed, and the company was not entitled on that ground to rescission of the contract. Strictly speaking, such notice may meet all the technical requirements. One who reads the prospectus knows the facts, and need not purchase unless he chooses. But when one buys without seeing the prospectus he is to be regarded as having constructive if not actual knowledge of the conditions. To allow a fiduciary relation to be satisfied by the fiction of constructive notice, however, seems to go far toward denying its essential feature. In practice the investing public buy shares without seeing the prospectus, or regard it as a document in which it is entirely possible to state facts in such manner as to dull their real significance. If then the principal case is followed, and mere statements of the prospectus be sufficient, in every case there must be a perplexing question as to whether the words really convey the meaning clearly, for if they do not the purchaser is not warned, and the promoter has accordingly failed in his duty. On the whole it seems better to insist upon a more stringent rule with reference to the promoter-vendor's duty than the principal case demands.



## RECENT CASES.

**AGENCY — EMERGENCIES — IMPLIED AUTHORITY OF CONDUCTORS.** — *Held*, that a conductor cannot bind his employers for a doctor's services rendered to trespassers injured by an accident to the train on which they were riding. *Adams v. Southern Ry. Co.*, 34 S. E. Rep. 642 (N. C.).

The question as to how far an agent's authority may be increased by emergencies is still an open one. By the weight of authority, however, the doctrine of this case applies even where the injured persons are passengers or employees. *St. Louis, etc. R. R. Co. v. Olive*, 40 Ill. App. 82; *Peninsular R. R. Co. v. Gary*, 22 Fla. 356; *Cox v. Midland Counties Ry. Co.*, 3 Ex. D. 268. As a matter of expediency, where the emergency is pressing, the contrary view seems the more reasonable. *Toledo, etc. R. R. Co. v. Mylott*, 6 Ind. App. 438. Under the latter doctrine, had there been any question in this case as to the character of the injured persons, it seems the defendant might have been liable, for it would then have been the duty of the conductor to decide whether they were trespassers or not, and his mistake of judgment would not have relieved the defendant from liability. *Seymour v. Greenwood*, 6 H. & N. 359. The correctness of the actual decision, however, can hardly be questioned. The defendant was under no duty to care for such trespassers, and the conductor's act was clearly without the scope of his authority, expressed or implied.

**AGENCY — VICE-PRINCIPAL DOCTRINE — FELLOW SERVANTS.** — In the absence of special powers conferred upon the conductor of a freight train, *held*, that such conductor and the engineer are fellow servants within the rule exempting the master from liability for negligence of one servant towards another. *New England R. R. Co. v. Conroy*, 20 Sup. Ct. Rep. 85.

The rule prevails in several states that two employees under a common employer are not fellow servants if one is subject to the orders of the other and so falls under his control. The superior employee is said to be a vice-principal, and for his negligence towards inferiors the ultimate master is held liable. *Cleveland, etc. Ry. Co. v. Keary*, 3 Ohio St. 202; *Chicago, etc. Ry. Co. v. May*, 108 Ill. 288. This doctrine was applied by the Supreme Court to facts identical with those in the principal case in *Chicago, etc. Ry. Co. v. Ross*, 112 U. S. 377, which decision is now for the first time explicitly overruled, although it has been twice inferentially repudiated. *Baltimore, etc. Ry. Co. v. Baugh*, 149 U. S. 368; *Northern, etc. Ry. Co. v. Peterson*, 162 U. S. 364. The present decision is to be welcomed as definitely settling the attitude of the Supreme Court towards the "Ross case," and as dealing a severe blow to the vice-principal doctrine, which is believed to be unsound. See 8 HARV. LAW REV. 57; 12 HARV. LAW REV. 147; McKinney, *Fellow Servants*, Chap. IV. The doctrine can now be applied by the Supreme Court at most to cases of a considerable difference in grade between the employees, and then by virtue of a distinction which seems arbitrary rather than logical.

**BANKRUPTCY — FIDUCIARY DEBTS — DISCHARGE.** — *Held*, that a debt due by the bankrupt, a commission merchant, arising out of his failure to account for the proceeds of goods consigned to him for sale on commission, is released by his discharge in bankruptcy. *Re Busch*, 97 Fed. Rep. 761 (Dist. Ct., N. Y.).

By the Bankruptcy Act of 1898, as is usual in bankruptcy legislation, debts created by misappropriation while acting in any fiduciary capacity are not discharged. § 17 (4). The question whether under the circumstances of the principal case the debt is within this exception has caused much diversity in the authorities. Under the state laws it has been held that such debts are contracted in a fiduciary capacity. *Meador v. Sharpe*, 54 Ga. 125; *Whitaker v. Chapman*, 3 Lans. 155. *Contra*, *Anstill v. Crawford*, 7 Ala. 335; *Chipley v. Frierson*, 18 Fla. 639. Under the federal statutes, the Supreme Court of the United States finally held, in accord with the principal case, that such a debt was discharged. *Chipman v. Forsythe*, 2 How. 202; *Hennequin v. Clewes*, 111 U. S. 676. Upon abstract principles, doubtless, a factor is a fiduciary, and so debts created by his misappropriation should not be discharged. But the decision in the principal case may be justified by the usage of factors, often recognized as a legal right, to mix the proceeds of sales with their own money, and thereby to become debtors merely. *Hew-lick v. McDonald*, 80 Cal. 472; *Vail v. Durant*, 90 Mass. 408. Accordingly, the decision in the principal case may be accepted without much hesitation.

**BANKRUPTCY — SURRENDER OF PREFERENCES.** — A creditor held two promissory notes of his insolvent debtor. Within four months of the bankruptcy but without any

knowledge of the insolvency, he received payment of one of the notes. *Held*, that he cannot prove the other note in the bankruptcy proceedings without first surrendering the payment so received. *Re Conhaim*, 97 Fed. Rep. 923 (Dist. Ct. Wash.).

The Bankruptcy Act of 1898, § 57 g, provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." Under the Bankruptcy Act of 1867, § 23, such creditors were prohibited from proving the "claim on account of which the preference was made." Under that provision the courts held that where the creditor had two disconnected debts, as in the principal case, and had been preferred as to one, he might prove the other without surrender of the preference. *Re Richter*, Fed. Cas. No. 11803; *Re Aspinwall*, 11 Fed. Rep. 136 (Dist. Ct. N. Y.); *Re McVay*, 13 Fed. Rep. 443 (Dist. Ct. Pa.). It may well be doubted whether the variation in the language of the two provisions is sufficient to warrant a different construction under the present act in any case. Moreover, the principle of interpretation, *reddendum singula singulis*, would seem to apply and lead to a result the opposite of that reached in the principal case. At all events, there is no justice in the principal case.

CONFLICT OF LAWS — GARNISHMENT — JURISDICTION OF DEBT. — *Held*, that the *situs* of a debt for the purposes of garnishment is at the domicile of the creditor. *Central of Georgia Ry. Co. v. Brinson*, 34 S. E. Rep. 597 (Ga.).

*Held*, that the garnishment of a resident debtor for a debt due to a non-resident defendant is not void. *King v. Cross*, 20 Sup. Ct. Rep. 131. See NOTES.

CONFLICT OF LAWS — JURISDICTION — NULLITY OF MARRIAGE. — *Held*, that an Irish court has jurisdiction to make a declaration of nullity in the case of a marriage celebrated in India when the party whose capacity is in question was domiciled in Ireland at the time of the marriage. *Johnson v. Cooke*, [1898] 2 Ir. 130.

A decree of nullity declares the marriage void from the beginning. No court can properly make such a decree except in a jurisdiction which had power over the *status* at its inception. Hence it seems that in this country there is no jurisdiction to decree nullity except in the place of celebration. *Cumington v. Belcherstown*, 149 Mass. 223. The House of Lords has decided, however, that the validity of a marriage, as far as the capacity of the parties is concerned, depends upon the law of the domicile of the parties, and not that of the place of celebration. *Brook v. Brook*, 9 H. L. Cas. 193. Since, under this rule, it was the law of Ireland which gave this marriage its validity, if it had any, it appears that the court was right in asserting its power to declare the marriage void.

CONSTITUTIONAL LAW — IMPAIRING THE OBLIGATION OF CONTRACTS. — The defendant city granted the plaintiff a non-exclusive franchise to build and maintain a water system. Later the city constructed a water system of its own under statutes which allowed it to tax the plaintiff for the payment of obligations incurred in the construction of the defendant's works, and authorized a discriminating tax against the plaintiff's patrons, thus forcing them to leave the plaintiff. *Held*, that these provisions are unconstitutional, since they impair the obligation of a contract by tending to destroy the value of the plaintiff's franchise through other means than competition. *Skaneateles Waterworks Co. v. Skaneateles*, 55 N. E. Rep. 562 (N. Y.).

Public grants are to be construed strictly. *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420. Accordingly, it seems clear that as this was not an exclusive grant the city could construct a competing water system. *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167. In fact the court admits this, and thereby seems to destroy the ground upon which the decision is rested. Perhaps such taxation may deprive the plaintiff of the equal protection of the law, and may deprive it of its property without the due process of law secured by the Fourteenth Amendment, but this suggestion was not considered. The city did not contract not to tax the plaintiff or its patrons unjustly, any more than it agreed not to compete with the plaintiff. If a contract cannot be implied in one case, it cannot in the other. The court, indeed, distinguishes the *Charles River Bridge Case* by restricting its application to cases of competition. But its principle seems entirely applicable to the present case. There the plaintiff's patronage was destroyed by relieving those crossing by the adjacent bridge from the burden of toll. Here an extra burden is imposed on the plaintiff's patrons. In each case the result is to destroy patronage, and only indirectly to affect the grant.

CONSTITUTIONAL LAW — RAILROADS — STATUTORY LIABILITY TO PASSENGERS. — *Held*, that a state statute making railroad companies absolutely liable for injuries to passengers who are without fault, irrespective of the company's negligence, does not violate the Fourteenth Amendment of the United States Constitution. *Clark v. Russell*, 97 Fed. Rep. 900 (C. C. A., Eighth Cir.).



The argument against the constitutionality of such a statute is that it violates the Fourteenth Amendment in that it is an arbitrary and unreasonable exercise of legislative power, depriving the railway company of its property without due process of law, and denying to it the equal protection of the laws. Such a statute, however, is undoubtedly within the legitimate sphere of legislative power. The legislature may well consider it advantageous to impose such liability upon railroads, and may properly impose conditions under which corporations created by its laws shall conduct their business in the future. Whether the railroad is deprived of property or not, therefore, it is by due process of law. *St. Louis, etc. R. R. Co. v. Mathews*, 165 U. S. 1. Similar statutes imposing an absolute liability on railroads for damages by fire have been universally upheld, and exist in many states. *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447; *Rodemacher v. Milwaukee, etc. R. R. Co.*, 41 Iowa, 297. Nor is such a statute open to the objection that it denies to the railroad the equal protection of the laws. It has been repeatedly held that there is no evasion of the rule of equality when all railroad companies in the state are subjected to the same duties and liabilities under similar circumstances as in the present case. *Missouri Pacific R. R. Co. v. Humes*, 115 U. S. 512; *Missouri Pacific R. R. Co. v. Mackey*, 127 U. S. 205.

CONSTITUTIONAL LAW — REGISTRATION ACT. — *Held*, that the Torrens system of land registration is constitutional. *Tyler v. Judges of the Court of Registration*, 55 N. E. Rep. 812 (Mass.). See NOTES.

CONTRACTS — IMPLIED PROMISE TO USE DUE CARE — DUTY TO THIRD PERSONS. — A mortgagor purchased of the defendant title company a certificate that the land in question was unincumbered, — expressly telling him that the plaintiff had agreed to take a mortgage provided he would get such a certificate. The land proved to be subject to a prior recorded mortgage. *Held*, that the plaintiff has a contractual recovery for his loss either as a mortgagor's principal or as the sole beneficiary of an implied promise to use due care. *Economy, etc. Assn. v. West Jersey, etc. Co.*, 44 Atl. Rep. 854 (N. J., Sup. Ct.).

It is hardly possible to admit that the mortgagor was acting as the plaintiff's agent, for he dealt with the defendant purely in his own interest, and not in pursuance of any duty imposed on him by the plaintiff. *Harris v. Bradley*, 7 Yerg. 310. Nor is the plaintiff's right as sole beneficiary clear. The certificate contains no express undertaking upon which there may be an action, the purchaser's remedy being for the breach of a promise implied in law to use due care. *Houseman v. Girard, etc. Assn.*, 81 Pa. St. 256; *Smith v. Holmes*, 54 Mich. 104. It seems impossible, however, to allow a stranger to the *quid pro quo* to take advantage of a promise implied in law, and for the same reason it is equally impossible to imply the promise directly to him. Though the plaintiff is without contractual right against the defendant, perhaps, in principle, he should be given an action in tort for a negligent misrepresentation. What authority there is, however, holds that a person is under no duty, in the absence of contract, to use care not to make misrepresentations. *Le Lievre v. Gould*, [1893] 1 Q. B. 491; *Savings Bank v. Ward*, 100 U. S. 195; *Day v. Reynolds*, 23 Hun, 231.

CONTRACTS — IMPOSSIBILITY OF PERFORMANCE — ILLNESS. — After becoming engaged the defendant without fault contracted a serious disease. *Held*, that this is a valid defence to an action for breach of promise to marry. *Sanders v. Coleman*, 34 S. E. Rep. 621 (Va.).

There is a well-established class of cases where, although there has been a failure to perform a contract, the law gives, what is really an equitable defence, on the ground of so-called "impossibility." See 12 HARV. LAW REV. 501. Such a defence has been allowed on facts similar to those in the principal case. *Shackleford v. Hamilton*, 93 Ky. 80; *Allen v. Baker*, 86 N. C. 91. The opposite view has received support, however, *Hall v. Wright*, E. B. & E. 765. Analogous to these cases are those where illness excuses a failure to render personal services. *Spalding v. Rosa*, 71 N. Y. 40; *Boast v. Firth*, L. R. 4 C. P. 1. One might distinguish the principal case, on the ground that a formal performance of the marriage ceremony is possible. But the fact remains, that any attempt at substantial performance would be both injurious to the defendant and deplorable on grounds of public policy. The result seems, therefore, equally desirable and just.

CORPORATIONS — PROCEDURE — DISQUALIFICATION OF JUDGE BY INTEREST. — *Held*, that a judge whose wife is a stockholder in a corporation is incompetent to try a suit to which the corporation is a party. *First Nat. Bank of Rapid City v. McGuire*, 80 N. W. Rep. 1074 (S. D.).

It is generally recognized that a shareholder in a corporation is incompetent to act as

judge in a suit where the corporation is a party. *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759. But where, as in the principal case, the judge is related to a stockholder, the question has generally been left to his discretion. *Matter of Dodge & Stevenson Mfg. Co.*, 77 N. Y. 101; *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315. This seems to be the sounder rule. The authorities do not justify the conclusion that a judge is necessarily disqualified except by some direct pecuniary or proprietary interest in the result of the suit. *Northampton v. Smith*, 52 Mass. 390. As it is obviously impracticable to exclude a judge from every suit in which he may be personally interested, it seems better to leave cases which fall outside this simple rule to the good sense of judges, subject of course to the power of higher courts to check abuse. The result in the principal case may possibly be supported as an exercise of this power, but the decision is rested solely on the fact of relationship.

**CORPORATIONS — PROMOTER A FIDUCIARY — DISCLOSURE OF RELATION.** — The plaintiff company was formed by the defendant syndicate to purchase property of the latter. The syndicate chose its own directors to manage the new company. *Held*, that a bare statement of the relation in the prospectus discharges the fiduciary obligation of the vendors. *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. D. 392. See NOTES.

**CORPORATIONS — SERVICE OF SUMMONS — JUDGMENT BY DEFAULT.** — Service of summons was made on a director of the defendant company, who, through unfriendliness to the corporation, but without collusion with the plaintiff, failed to report the service. *Held*, that a judgment by default obtained under these circumstances will be set aside and the company permitted to answer. *Farrar v. Consolidated Apex Mining Co.*, 80 N. W. Rep. 1079 (S. D.).

There is a remarkable lack of authority on the point, owing probably to the fact that, in the absence of collusion, the success of a corporation is generally to the pecuniary advantage of a director. It is certainly hard, from the standpoint of the corporation, to allow judgment to be entered against it merely because of the neglect or unfriendliness of a director in failing to notify the company of the service of process. Still, where, as in South Dakota, service, in a suit against a corporation, may be made on a director, the corporation, it seems, must necessarily run such a risk. If there has been collusion, the judgment should certainly be set aside; but where the plaintiff has acted with entire good faith, as is assumed in the present case, it is the logical, though perhaps harsh, result of a statute allowing such service, that the loss should fall on the corporation. The opposite view, taken by the principal case, might defeat the object of the statute by disclosing a loophole whereby a corporation could escape the consequences of a service of process.

**CRIMINAL LAW — INDICTMENT — REPEAL OF STATUTE.** — The statute under which the defendant had been indicted was repealed without saving clause, and reenacted the same day to go into effect one day later. *Held*, that the indictment is good. *State v. Southern Ry. Co.*, 34 S. E. Rep. 527 (N. C.).

It is generally recognized that the repeal of a statute and its simultaneous reenactment operate merely as a reaffirmance. *Bish. Stat. Cr.* § 181; *State v. Gumber*, 37 Wis. 298. But in the principal case the reenacting statute did not go into effect at the time the repeal did, and the ordinary rule would seem to apply that no proceedings can be carried on under a statute which has been repealed without saving clause. *Regina v. Denton*, 18 Q. B. 761; *Griffin v. State*, 39 Ala. 541. The court disposes of this difficulty on the ground that the result was a mere suspension of the former act, the intervening day being *dies non*. But the same argument would apply equally if the later act were passed five years later, a result which would hardly be countenanced. *End. Stat. Interp.* § 491; *Kane v. New York, etc. R. R. Co.*, 49 Conn. 139. Some support may be found for the decision in the cases which hold that where a repealing statute is repealed a prosecution under the original statute may be continued. *Commonwealth v. Getchell*, 33 Mass. 452. But even in such cases this is not the better view. *Commonwealth v. Leech*, 24 Pa. St. 55.

**CRIMINAL LAW — LIBEL — PRIVILEGE.** — The defendant, in good faith, published an article in his newspaper falsely charging a candidate for district judge with crime. The newspaper's circulation extended without the judicial district. *Held*, that the publication is not privileged, and that the defendant was properly convicted of criminal libel. *State v. Hoskins*, 80 N. W. Rep. 1063 (Iowa).

Declining to discuss whether a charge against a candidate for office is privileged when made *bona fide* to protect the public interests, the court rests its decision on the narrow ground that the publication was not confined to the district directly concerned.



If the communication is privileged, the privilege ought not to be lost so long as a reasonable use is made of it. *Hatch v. Lane*, 105 Mass. 394. And it seems that it is not an unreasonable use to publish the communication in a paper which in its circulation reaches others than those directly interested. By the weight of authority, under no circumstances could such a false charge be privileged. *Duncombe v. Danell*, 8 C. & P. 222; *Commonwealth v. Clap*, 4 Mass. 103; *Sweeney v. Baker*, 13 W. Va. 158. But there are a number of cases *contra*. *Briggs v. Garrett*, 111 Pa. St. 404; *Marks v. Baker*, 28 Minn. 162. The latter view seems preferable upon grounds of public policy. The public interests should be protected even at the risk of occasional injustice to the individual; and this is only possible under the more liberal rule. See 23 Am. Law Rev. 346.

**EVIDENCE — DIVORCE — CHARACTER.** — In an action for divorce, on the ground of adultery, *held*, that the defendant can introduce evidence as to her general reputation. *Warner v. Warner*, 44 Atl. Rep. 908 (N. H.).

The court takes the ground that in divorce cases the common law rules of evidence do not apply. This is too sweeping a statement, and contrary to authority even in New Hampshire. *Washburn v. Washburn*, 5 N. H. 195; *Caton v. Caton*, 13 Eng. Jur. 431; 2 Bish. Mar. Div. & Separ. §§ 1350, 1427. Nevertheless, a decision in accord with the principal case has been reached, on the ground, that when the issue is as to the commission of a criminal act, the same evidence is admissible in a civil action, as would be admissible in a criminal prosecution. *O'Bryan v. O'Bryan*, 13 Mo. 6. The weight of authority, however, is opposed to this view also, and holds that character evidence is never admissible in a civil action, on the issue of the commission of an act. *Humphrey v. Humphrey*, 7 Conn. 116; *Day v. Ross*, 154 Mass. 13; *American, etc. Co. v. Hazen*, 110 Pa. St. 530. There seems, therefore, to be no sound ground upon which to support the principal case.

**PERSONS — HUSBAND AND WIFE — CONTRACT OF SEPARATION.** — *Held*, that a contract between husband and wife to live apart is void as against public policy, where neither has been guilty of conduct which would justify a judicial separation. *Poillon v. Poillon*, 61 N. Y. Supp. 582 (Sup. Ct., Trial Term); *Scherer v. Scherer*, 55 N. E. Rep. 494 (Ind.).

In the United States it is held almost universally that it is against public policy to enforce such an agreement. To give effect to it, it is urged, would be to allow the parties to free themselves from the marriage relation at will, and would have the undesirable tendency of weakening family ties. *McCrocklin v. McCrocklin*, 2 B. Mon. 370; *McKenna v. Phillips*, 6 Whart. 571. The English decisions, though formerly in accord with the present case, now maintain that such a contract is not against public policy. It is thought to be to the interests of the public to have family differences settled without the expense and scandal incident to the divorce court, and that such separations are more productive of morality among married people. *Besant v. Wood*, 12 Ch. D. 605; *Marshall v. Marshall*, 5 P. D. 19. As easy divorces are naturally conducive to hasty and ill-considered marriages, however, the standard of marriage is probably more likely to be raised by the doctrine of the present case than by the English view.

**PLEADING — TROVER — NATURE OF PLAINTIFF'S RIGHT.** — The plaintiff wrongfully entered land and cut and removed timber to which he had no right. The defendant, without claim of right, took the logs. *Held*, that the plaintiff cannot recover in an action in the nature of trover, since he had not title to the property. *Russell v. Hill*, 34 S. W. Rep. 620 (N. C.).

The court laid stress on the fact that, as the true owner could recover from the defendant, to allow trover here would subject him to two actions. They admitted, however, that the plaintiff could maintain trespass. This is open to the same objection. When trover was first devised, under the fertile statute of West. II., as an action against a finder for wrongfully detaining plaintiff's goods, it is true the plaintiff's right was not founded on a bare possession, but on a right to possession. But the advantages of this fictitious action operated to give it a wonderful growth. In trespass, where the defendant could wage his law, the court allowed the plaintiff to waive the taking and sue for the detaining of his chattel. *Basset v. Maynard*, 1 Roll. Ab. 105; *Bishop v. Montague*, Cro. El. 824. The trover came to occupy the whole field covered by the old actions of trespass and detinue. 11 HARV. LAW REV. 252, 384. Furthermore, it is not true that this doctrine allows two actions for one wrongful act. The wrong done the plaintiff here is the taking from his possession, while it is the detaining of his chattel for which the true owner can sue. Accordingly, the doctrine of the principal case seems indefensible.

PROPERTY — ARTIFICIAL WATERCOURSE — PRESCRIPTION. — For over twenty years, water from an artificial drain on the plaintiff's land had passed onto the defendant's land, and there been used by the defendant. *Held*, that the defendant has acquired no right to this supply of water. *Hanna v. Pollock*, [1898] 2 Ir. 532.

The proposition that one cannot acquire a prescriptive right to the use of water from a watercourse that is artificial and temporary in its nature is made the basis of this decision, and is supported by considerable authority. *Arkwright v. Gell*, 5 M. & W. 203; *Wood v. Waud*, 3 Ex. 748; *Greatrex v. Hayward*, 8 Ex. 291. It is very questionable whether any such distinction between natural and artificial watercourses is sound. Indeed it has been held that if a man tortiously divert onto his own land an artificial stream and use it for twenty years, a prescriptive right will be gained thereby, since the user was always actionable as against the owner of the land from which the stream was diverted. *Beeston v. Weate*, 5 E. & B. 986; *Watkins v. Peck*, 13 N. H. 360. The decision in the principal case, however, is doubtless correct on the facts, since the defendant's passive reception of the water sent down on him by the plaintiff was in no way actionable, and could therefore give rise to no right against the plaintiff.

PROPERTY — COVENANT AGAINST INCUMBRANCES — SUCCESSIVE GRANTEES. — The defendant conveyed incumbered land to B with a covenant against incumbrances. B conveyed to C expressly subject to the incumbrance, and C conveyed to the plaintiff covenanting against incumbrances. The plaintiff paid the incumbrance. *Held*, that he cannot recover from the defendant, since the conveyance from B to C was expressly subject to the incumbrance. *Geissler v. De Graaf*, 60 N. Y. Supp. 651 (Sup. Ct., App. Div., First Dept.).

A covenant against incumbrances is broken, if at all, as soon as made, and, as the American authorities repudiate the English doctrine of continuing breach, it follows that the original grantee is the only one who can logically bring an action for such breach. *Greenby v. Wilcocks*, 2 Johns. 1. But now in New York, since the assignee of a chose in action is allowed by statute to sue in his own name, the practical results of the English doctrine are accomplished by holding that the deed operates as an assignment of the chose in action, giving a right to sue on the broken covenant to the assignee who sustains substantial damage. *Clarke v. Priest*, 21 N. Y. App. Div. 174. In the principal case the original grantee paid for a clear title and was compelled to sell the land incumbered, thus suffering substantial damage. *Funk v. Voneida*, 11 S. & R. 109. Therefore the right to maintain an action on the broken covenant vested in him and subsequent grantees could acquire no rights under it. Applying the doctrine of continuing breach to similar facts produces a like result. *Kingdon v. Nottle*, 1 M. & S. 355. The principal case is doubtless correct.

PROPERTY — FRAUDULENT CONVEYANCE — ORAL TRUST. — X for the purpose of defrauding his creditors conveyed land to his son upon an oral trust for himself. The son to get the property out of the reach of his creditors reconveyed the land to X. *Held*, that the reconveyance is valid as against the creditors of the son. *Lockren v. Rustan*, 81 N. W. Rep. 60 (N. D.).

X could not have enforced the express trust, because it was not in writing as required by the Statute of Frauds. Nor would a court of equity have declared a constructive trust in favor of X, the parties being *in pari delicto*. Wait, *Fraud. Convey.* 2d ed., 396. This rule is universal, although there is an apparent tendency to relax upon it in some English cases. *Bowes v. Foster*, 2 H. & N. 779. But an express trust, while unenforceable, nevertheless did exist, and the trustee having voluntarily performed his duty under it, although with fraudulent intent, the transaction is unassailable except by such persons as had acquired a lien on the property on the faith of the apparent absolute ownership. *Fargo v. Ladd*, 6 Wis. 106. The decision seems therefore sound.

PROPERTY — MORTGAGES — CLOGGING EQUITY OF REDEMPTION. — In a mortgage of leasehold property the mortgagee stipulated for one third of the net profits from all sub-leases during the term, besides interest. *Held*, that this provision does not fall within the rule against clogging the equity of redemption and is valid. *Santley v. Wilde*, [1899] 2 Ch. D. 474. See NOTES.

SALES — CONDITIONAL SALE — RISK OF LOSS. — The plaintiff sold to the defendant certain goods the title to which the former was to retain until the price was paid. Before payment an accidental fire destroyed the goods. *Held*, that the loss falls on the plaintiff. *Mountain City Mill Co. v. Butler*, 34 S. E. Rep. 565 (Ga.).

This case represents the settled rule in the state of Georgia. *Green v. Knoop*, 73 Ga. 570. Almost the entire weight of authority, however, is *contra*. *Torp v. White*, 12 Heisk. 165; *Tufts v. Griffin*, 107 N. C. 47. On principle, also, the decision seems in-



defensible. The vendor in such a case holds the title merely as security for the payment of the price, and the result is the same as if the vendor had conveyed the title to the vendee and the latter had reconveyed it to the vendor by way of mortgage. The position of the parties in fact seems completely analogous to that of mortgagor and mortgagee in jurisdictions where the title passes, and in almost all such cases the mortgagor, since he is substantial owner, must bear the loss if the property mortgaged is accidentally destroyed or injured. *Osborn v. Nicholson*, 13 Wall. 654; *Morgan v. Scott*, 26 Pa. St. 51. The loss in the principal case, therefore, should fall on the vendee. See 9 HARV. LAW REV. 106.

**SALES — FOREIGN ORDER — WHERE COMPLETED.** — The defendant in Iowa ordered liquors of the plaintiff in Illinois, but before the goods were shipped countermanded the order. Thereafter the plaintiff sent the liquor and the defendant accepted it and used it. The sale of liquor in Iowa is prohibited by statute. *Held*, that the plaintiff can recover the price of the goods. *Gross v. Feelan*, 81 N. W. Rep. 235 (Iowa).

The decision seems doubtful. A sale occurs in that jurisdiction in which the title passes. *State v. O'Neil*, 58 Vt. 140; *Commonwealth v. Fleming*, 130 Pa. St. 138. To constitute a sale there must be a contemporaneous assent by both vendor and vendee that the title shall pass from one to the other. *Benj. Sales*, 7th Am. ed., § 38. In the principal case the revocation of the order by the defendant destroyed its effect, *Parsons*, Contr. 8th ed., 498, and when the goods were shipped it was without the assent of the vendee. Therefore the title did not pass to him by the delivery to the carrier in Illinois. *The Francis*, 2 Gall. 391; *The Julia*, 8 Cranch, 183. The sale then did not take place in Illinois. The title did, however, vest in the defendant when he accepted the goods in Iowa. *Wellauer v. Fellows*, 48 Wis. 105. Since, therefore, the sale occurred in a state where such a transaction is illegal, the vendor cannot recover the price. *Foster v. Thurston*, 11 Cush. 322; *Briggs v. Campbell*, 25 Vt. 704.

**SALES — GOODS IN POSSESSION OF BAILEE — RIGHTS OF MORTGAGEE.** — The mortgagor of chattels in the possession of a bailee gave the mortgagee an order on the bailee for the goods. Before the mortgagee had notified the bailee of his claim, or the mortgage had been recorded, the creditors of the mortgagor attached the goods. *Held*, that the order is insufficient to protect the mortgagee. *Strahorn, etc. Co. v. Quigg*, 97 Fed. Rep. 735 (C. C. A., Eighth Cir.).

It is a moot question how much is necessary to protect the vendee or mortgagee against the attaching creditors of the vendor or mortgagor, where the goods have not actually been delivered or the deed recorded. If the goods remain in the possession of the vendor after the sale, the attachment is generally held good, because the vendee has allowed the vendor to appear to be the absolute owner, and the creditor has a right to regard him as such, unless he has notice to the contrary. *Ludwig v. Fuller*, 17 Me. 162. The principal case, like perhaps the majority of the cases in point, holds that the same considerations require notice to the bailee, if the goods are in possession of a third party, to make an assignment of the vendor's interest effective against creditors. *Whitney v. Lynde*, 16 Vt. 579. It seems, however, that on principle the question of notice to the bailee is immaterial. *Bitt v. Caldwell*, 4 Bibb, 458; *Puckett v. Reed*, 31 Ark. 131. The vendor is not made to appear the absolute owner, as he has not possession, and there is little chance that his creditors will be deceived by the situation. The vendee has acquired by assignment complete title to the goods, and no sufficient reason appears for subjecting them to the claims of the creditor of another person.

**SALES — MORTGAGE OF AFTER-ACQUIRED PROPERTY.** — *Held*, that a chattel mortgage of all the personal property the mortgagor should acquire during certain years is void as against third persons. *Ferguson v. Wilson*, 80 N. W. Rep. 1006 (Mich.). See NOTES.

**SURETYSHIP — MERGER — LOSS OF SECURITY.** — A principal debtor executed a mortgage of indemnity to his surety, who assigned it to the creditor. The debtor then made an absolute conveyance of the premises to the surety, who assumed the debt. The surety afterwards conveyed the property to the creditor by a deed absolute in form as a security for his further indebtedness. *Held*, that the creditor has a lien upon the land by virtue of the mortgage prior to that of a subsequent judgment creditor of the surety. *Oak Creek, etc. Bank v. Helmer*, 80 N. W. Rep. 891 (Neb.).

There is always a merger at law when a greater and less estate coincide in the same person in the same right. In such cases, however, equity will frequently keep alive the lesser interest in order to give effect to the real intention of the parties to a transaction. *Jones, Mortg.*, 4th ed., § 848. The principal case is an instance of a sound application of this doctrine, which has been strangely overlooked in a class of suretyship cases

somewhat analogous to this. It has been held that where a creditor holds a mortgage upon land of his debtor, in which he afterwards acquires the fee, there is a merger of the creditor's interests, a destruction of a security to which the surety had a right to be subrogated, and a consequent discharge of liability on the suretyship obligation. *Wright v. Knepper*, 1 Barr, 361; *Johnson v. Young*, 20 W. Va. 614. There seems to be no reason why the substantial rights of the creditor should not be preserved in such cases by a resort to the doctrine of the principal case.

**TORTS — PROTECTION OF PROPERTY — IMMINENT DANGER.** — The defendants in order to protect their property from destruction by a prairie fire set back-fires. *Held*, that the defendants are not liable for damages resulting from such back-fires. *Owen v. Cook*, 81 N. W. Rep. 285 (N. D.). See NOTES.

**TRUSTS — CHARITABLE TRUSTS — UNCERTAINTY.** — A testator devised his entire estate to his executor in trust to expend for such charitable objects in the diocese of Louisville as the executor should choose. *Held*, that the trust is void for uncertainty. *Spalding v. Saint Joseph's Industrial School*, 54 S. E. Rep. 200 (Ky.).

The result reached in this case is, of course, unfortunate and apparently unnecessary. Charitable trusts of an indefinite nature have been enforced in Kentucky, *Attorney-Gen. v. Wallace's Devisees*, 7 B. Mon. 617, but the court distinguishes such cases on the ground that, in them, the trustee's discretion was limited to a certain class of charitable uses. This distinction seems untenable on principle. The reason that trusts with no definite *cestui* named fail is that there is no one to compel the trustee to act. *Morice v. The Bishop of Durham*, 10 Ves. 521. But this reasoning does not apply to trusts for charitable objects, whether the trustee has absolute discretion, as in the principal case, or is limited to certain fields of charitable objects, because in either case the Attorney-General is usually given power to enforce the trust. *Jackson v. Phillips*, 96 Mass. 539; *Yidal v. Girard's Executors*, 2 How. 127. If the Kentucky courts allow one class of trusts to be so enforced, it seems that they should the other.

**TRUSTS — PAROL CONTRACT TO CONVEY LAND — CONSTRUCTIVE TRUST.** — The plaintiff conveyed a third interest in certain land to the defendant upon his parol agreement to reconvey a half interest in the same land. The defendant refused to perform his agreement. *Held*, that the plaintiff may recover his third interest. *Alexander v. McDaniel*, 34 S. E. Rep. 405 (S. C.).

When land is conveyed in exchange for an oral agreement to reconvey or to hold in trust for the grantor, and the grantee refuses to perform, setting up the Statute of Frauds as a defence, the American courts generally decline to hold him as a constructive trustee for the grantor, since by so doing the same relief would be granted as by enforcing the oral agreement or trust. *Williams v. Williams*, 180 Ill. 361; *McClain v. McClain*, 57 Iowa, 167. But where, as in the principal case, the oral agreement is to exchange one piece of land for another, no objection is found to raising a constructive trust, such relief being different from that given by enforcing the oral agreement. *Simons v. Bedell*, 122 Cal. 341. The distinction here made is hardly satisfactory, for the Statute of Frauds expressly does not apply to constructive trusts, and the fact that relief cannot be given on one theory seems no reason for refusing it on another. In England and a few States a trust would be created in both cases. *Davies v. Otty*, 35 Beav. 208; *Giffen v. Taylor*, 139 Ind. 573; *Bowler v. Curler*, 21 Nev. 158. This, it is believed, is the juster view. See 12 HARV. LAW REV. 506; 13 HARV. LAW REV. 227.

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## REVIEWS.

In a recent review of Professor William MacDonald's *Select Charters Illustrative of American History*, 13 HARVARD LAW REVIEW 420, we stated that Professor MacDonald doubtless owes the Royal Proclamation concerning America, 1763, to Channing and Hart's *American History Leaflets*, yet does not acknowledge it. In response to an explicit denial by Professor MacDonald we gladly withdraw that statement.



**A TREATISE ON THE LAW OF DOMESTIC RELATIONS.** By W. C. Rodgers. In one volume. Chicago: T. H. Flood & Co. 1899. pp. cxxxiii, 900.

This work discloses great industry on the part of the author in the collection of cases and their statement. Mr. Rodgers has devoted himself to a consideration of particular decisions rather than to such an analysis of the cases as would lead to the fixing of general principles and would bring out sharply the conflict of authority on many of the subjects with which he deals. He has shown his respect for judicial opinion in his somewhat extended quotations of *dicta*, and has abstained from any severe criticisms. The book does not distinguish well between general principles and matters of detail and lacks conciseness. Much appears in the body of the work which another author would consign to the footnotes. On the other hand, there might be a more specific discussion of some of the leading cases on disputed questions, such as *Britton v. Turner*, 6 N. H. 481 and *Stark v. Parker*, 2 Pick. 266, cited in the notes to § 780. So the omission of any reference to *King v. Welcome*, 5 Gray 41, in connection with § 789 is unfortunate. The great value of the book to one seeking to reach the cases on the subject quickly is marred by an occasional lack of correspondence between the headnotes and the body of the sections. There is at times a reiteration of the same principle, as in §§ 66 and 78, and a disregard of the proportionate importance of principles. The chief value of the book is in the many cases which it cites.

E. F. M.

**COMMENTARIES ON THE PROCEDURE OF CIVIL COURTS IN BRITISH INDIA.**

By Hukm Chand. Bombay, 1899. pp. xiv, 127, 834.

The latest book by the author of "Res Judicata" and "Law of Consent" maintains the high reputation of its predecessors. This work is a commentary on the text of the Indian Code of Civil Procedure of 1882, which was founded upon the English Judicature Act of 1873. "The Indian courts," as Mr. Chand remarks in his preface, "have . . . been incessantly busy with the Code, explaining and developing it in its several parts, and turning out year after year several volumes of decisions, of which the majority, as in all countries, have reference to questions of procedure and practice." This ingenuous statement is a fair comment on the blessings of a code, which, we are told, will put the law within the reach of every reader, and dispense with a legally trained bench and bar. It is borne out by the experience of California, with its dozen volumes of reports in a good year, and by that of New York, with its library of Practice Reports; but the *dictum* should be limited to code states. In Massachusetts, for instance, with its common-law procedure, a somewhat careful investigation has shown that considerably less than one-fifth of all the cases can by the most liberal allowance be said even incidentally to involve any question of practice or procedure. As to the Indian act, it requires over eight hundred pages of comment to elucidate perhaps one fortieth as much legislation.

Mr. Chand's work, as one would have expected, is carefully and thoroughly done. The English and American reports, as well as the Indian reports, are cited in support of the author's propositions, and, it may be added, quite as accurately as an English or American author would cite them.

The book would be found useful, not only by a lawyer in a code state, but to a considerable degree in a common law state. The discussion on the subjects of Jurisdiction, Venue, Parties, *Res Judicata*, Foreign Judgments, and Set-off — in fact, the larger and more important part of the work — is of immediate practical use everywhere. It is lawyer-like, learned, and sound. Mr. Chand has again given us timely and convincing proof — if any were needed — that the principles of the common law find congenial soil in southern Asia.

J. H. B., JR.

THE LAW OF ANIMALS. By John H. Ingham. Philadelphia: T. & J. W. Johnson & Co. 1900. pp. xiii, 800.

The authorities which Mr. Ingham has collected upon the question of property in animals *feræ naturæ* which have been reclaimed amply justifies his contention that there is a well-marked legal distinction between animate and inanimate chattels. In torts and contracts the "law of animals" does not assume so definite a form. It is not so clearly differentiated, and the problems peculiar to animals still remain to a large degree questions of fact; nevertheless the distinction is there, and it furnishes a solid reason for the existence of Mr. Ingham's book. The greater part of the subject has of course been dealt with before in a fragmentary way by many text-writers, but in the sort of partial and incidental treatment which it has hitherto received many details are necessarily slighted, and in the no man's land which lies between the fields exploited by independent investigators not a few matters are likely to escape notice entirely. Mr. Ingham's work has certainly supplied any defects of this nature as far as the law of animals is concerned. The book is divided into seven main sections: Property in Animals, Transfer of Property, Rights of Owners, Liabilities of Owners, Bailment and Carriage, Cruelty and Game Laws, Injuries to Animals by Railways. Under these titles the writer has treated his subject with a fulness that leaves little to be desired. No pains appear to have been spared to make the collection of authorities complete, and the result is a book which will be of great practical assistance to lawyers. The discussion of the conflict of authority as to injuries to animals from defects in highways, and the elaborate treatment of the liability for injuries by railways, with its relation to fencing statutes, will prove especially valuable.

The author has perhaps adhered too closely to his policy of letting the cases speak for themselves without comment or criticism, and in consequence the book is a well-ordered and exhaustive digest rather than a scientific treatise. We can hardly agree that the duty of a text-writer is done when he has merely stated the conclusions reached in a large number of cases, nor does the principle of *stare decisis* carry such authority in his province as to make his dissent from decisions, obviously unsound on principle, either uninstructional or utterly ineffectual. It may be suggested also that the intention indicated in the preface of dealing only with such portions of the law as are affected by the peculiar qualities of animals might well have been pursued more strictly. Much of the section devoted to the Carriage of Animals is equally applicable to the carriage of any sort of property, and throughout the book is somewhat burdened with cases in which the fact that an animal happened to be connected with the subject of the litigation had no legal significance whatever.

F. E. H.



CHRISTIAN SCIENCE. An Exposition of Mrs. Eddy's Wonderful Discovery, including its Legal Aspects. By William A. Purrington. New York : E. B. Treat & Co. 1900. pp. 194. This little book expounds — mercilessly and convincingly — a particular form of quackery and the question of how far it is and can be dealt with in the law. It is practically a plan for protective legislation on the subject. The statements as to the inadequacy of the common law and the existing statutes are clear and sound.

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We have also received : —

JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION. Edited for the Society by John MacDonell and Edward Manson. New Series, No. 3, December, 1899. London : John Murray. 1899. pp. iv, 337-608.

STATE LIBRARY BULLETIN, Legislation No. 11. January, 1900. Legislation by the States in 1899, 10th Annual Comparative Summary and Index. Albany : University of the State of New York. 1900. pp. 395.

BULLETIN MENSUEL DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE. Trente et Unième Année. No. 1. Janvier, 1900. Paris. pp. 128.

AMERICAN DIGEST. Advance Sheets. No. 154. December, 1899. St. Paul, Minn. : West Publishing Company. 1899. pp. 546.





# HARVARD LAW REVIEW.

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VOL. XIII.

APRIL, 1900.

NO. 8

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## CONSTITUTIONAL REGULATION OF CON- TEMPT OF COURT.<sup>1</sup>

THE extension of the sphere of equitable relief by injunction, to meet new phases of interference with rights of persons and property evolved in "labor" controversies, has led to a great deal of alarmist criticism. While the writer does not believe that the courts have gone further than to apply well-settled principles to novel exigencies of civilization, he recognizes the sincerity and conscientiousness of some lawyers in their contention that there has been judicial usurpation of executive and legislative prerogatives which threatened constitutional liberty. Unfortunately, the cant phrase "government by injunction" has proved a very taking shibboleth in the mouths of demagogues, who would rally political sentiment for their own selfish ends under pretence of organizing to resist the growing tyranny of the courts. There has been so much comment that was soberly apprehensive, and so much more that was merely hysterical, that it may be taken for granted that the professional, as well as the lay, mind is now thoroughly alert to the evil tendency, if any, of judicial "expansion." The time, therefore, seems opportune for calling attention to a counter tendency, which beyond doubt exists, and, in the judgment of the

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<sup>1</sup> This paper was read on January 17, 1900, before the New York State Bar Association.

writer, is much more subversive of the integrity of our institutions. There is a constant and unmistakable disposition on the part of legislatures to invade the judicial province, and arrogate control of the exercise of judicial functions. A similar spirit in a less marked degree is wont to actuate executives, and here, unfortunately, well-settled principles of law make the authority to nullify judicial acts very clear.

Professor Woodrow Wilson has observed that "the natural, the inevitable tendency of every system of self-government like our own and the British is to exalt the representative body, the people's parliament, to a position of absolute supremacy. That tendency has, I think, been quite as marked in our own constitutional history as in that of any other country, though its power has been to some extent neutralized, and its progress in great part stayed, by those denials of that supremacy which we respect because they are written in our law."<sup>1</sup> In no particular has the legislative trend towards absolutism struck more vitally at the constitutional theory of three independent governmental departments than in the assumption to prescribe and regulate the power to punish for contempt of court. A court without a sheriff, and shorn of the right to enforce its mandates by contempt process, would be merely a debating society. The matter of fixing the general duties and powers of the sheriff already rests in the legislature. The courts of several states have realized that self-preservation demands the resistance of every legislative encroachment upon the historical judicial prerogative of inflicting penalties for contempt. The cases upon the subject are quite numerous, but it will be sufficient to cite three of the best considered of them: *In re Shortridge*, in the Supreme Court of California;<sup>2</sup> *State v. Morrill*, in the Supreme Court of Arkansas;<sup>3</sup> and *Carter v. Commonwealth*, in the Supreme Court of Virginia.<sup>4</sup> The following language from the opinion in *State v. Morrill* (*supra*) may be taken as a typical judicial utterance: —

"The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government; and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the federal and state institutions, and a favorite theory in the government of the American people.

<sup>1</sup> Congressional Government, p. 311.

<sup>3</sup> 16 Ark. 384.

<sup>2</sup> 34 Pac. Rep. 227.

<sup>4</sup> 32 S. C. 780.



"As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts, the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The *prohibitory* feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature, that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect, but to say that it is absolutely binding upon the courts, would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt."

The Constitution of the United States<sup>1</sup> provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish." The constitutions of California and Arkansas contain similar provisions expressly vesting "the judicial power." The constitution of Virginia provides: "There shall be a Supreme Court of Appeals, Circuit Courts, and County Courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this constitution, shall be regulated by law." Under this clause the Supreme Court of Appeals of Virginia has within a year past upheld the inherent judicial power to summarily punish for contempt as stiffly and radically as the courts of California and Arkansas.<sup>2</sup> It was expressly laid down in the Virginia case that the power is necessarily resident in, and to be exercised by, the court itself, and that a statute assuming to provide for jury trials in contempt cases was unconstitutional and void. Whether, therefore, the phrase, "judicial power" be or be not used, the weight of American authority is that the constitutional creation of a court impliedly calls into being the historical inherent power of the English courts to effectuate their own acts by contempt process.

The extent and nature of such power are well described in the following language of Chief Justice Wilmot, quoted from 3 Campbell's Lives of Chief Justices (p. 153), in the opinion in *Carter v. Commonwealth* (*supra*): —

<sup>1</sup> Art. III. Sec. 1.

<sup>2</sup> *Carter v. Commonwealth, supra.*

"The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the Supreme Court of Justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law; it is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be found about it; it cannot, therefore, be said to invade the common law; it acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury; it is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other."

The inherent power of courts to punish for contempt has been recognized by the Supreme Court of the United States in such cases as *U. S. v. Hudson*,<sup>1</sup> *Wells v. Commonwealth*,<sup>2</sup> and *Ex parte Robinson*.<sup>3</sup> In the decision last named, however, an important distinction is noted. After referring to the general inherent power, Mr. Justice Field, in the opinion of the court, says with regard to the Circuit and District courts: "These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831" (of Congress, limiting and defining authority and jurisdiction in contempt proceedings) "is therefore, to them, the law specifying the cases in which summary punishment for contempt may be inflicted." Mr. Justice Field does not go further than to express a doubt whether the statutory authority of limitation would apply to the Supreme Court of the United States. But, according to the reasoning of the opinion, it is quite clear that, if the point had been directly at issue, it would have been directly held that the contempt powers of that tribunal are not subject to congressional revision. It is logical enough to hold that when a constitution, instead of itself creating courts, confers the power upon a legislative body, the congress or legislature may, as part of its act of creation, prescribe

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<sup>1</sup> 7 Cranch, 32.

<sup>2</sup> 21 Gratt. 503.

<sup>3</sup> 19 Wall. 505.



what shall be the powers of its creatures as to contempt, as well as their jurisdiction and authority in other matters. According to such doctrine the Supreme Court of the United States, being called into being by the Constitution without intermediary legislation, has general, extra-statutory power to enforce its mandates by contempt process, and the same is true of courts constitutionally provided for in the various states. On the other hand, courts whose source of existence is a state statute would be subject to statutory restriction of contempt process in like manner as the federal Circuit and District courts.

The distinction indicated by Mr. Justice Field illustrates and emphasizes the point towards which our discussion has tended. The power of the courts to punish for contempt should be expressly granted and defined in the various constitutions. This is an essential function of a court as such. If it be subject to legislative supervision and curtailment, judiciaries may be reduced to the condition of mere advisory bodies, losing their independent status as coördinate departments of American government. It may be suggested that, as courts have shown the disposition and firmness to take care of themselves, as witness the cases above cited, constitutional provision on the subject is unnecessary. Fortunately there is much force in this contention. But it should be remembered that, because of the legislative tendency to transgress constitutional bounds and absorb the entire governmental power, there is a constant liability to unseemly friction between the judicial and legislative departments. That there is a widespread disposition to encroach upon judicial prerogatives is shown by the enactment of the statutes which in the decisions before referred to were pronounced non-authoritative by the courts of Arkansas, California, and Virginia respectively. Furthermore, in cases where the right to create courts is conferred upon legislatures, it may be well to define in advance in the constitution the contempt power which such tribunals shall possess when summoned into being. While it may be logical in theory, it may not be expedient to concede this authority to the legislature. It may be proper to commit to legislative discretion the formation of new courts of limited or general jurisdiction as the necessity for them arises. But when such tribunals are formed they should be endowed with the usual judicial power within their jurisdiction, without which they cannot be held to independent responsibility.

Moreover, in at least one of the states the courts have not evinced proper self-respect and self-assertion. In the great state

of New York "an evident effort was made to codify the law of contempt and bring it within definite and fixed rules." In *People ex rel. Munsell v. Court of Oyer and Terminer*,<sup>1</sup> it was laid down that, under statutory provisions discussed, "the common law right as to private contempts was preserved outside of and beyond the statute enumeration, and this was deemed safe and prudent, because, in cases affecting only private rights and wrongs done merely to the suitor, the court would be under little or no temptation to unduly strain or exercise their power." As to public contempts, "precise limitations were needed, and any shred or remnant of undefined common law power was deemed dangerous. And so the legislature decreed that 'every court of record shall have power to punish as for a criminal contempt persons guilty of either of the following acts *and no others*.' . . . So that, for the criminal contempt, we may look only to the statute, while for the private or civil contempt we may resort, if need be, to the common law." The opinion in this case contains no consideration or discussion of the power of the legislature to "codify the law of contempt." It is taken for granted, though the constitution of New York has provisions at least as appropriate as those of the Virginia constitution for vindicating the inherent power which other courts have held exists independently of, and even in spite of, legislation. The New York Court of Appeals has thus surrendered to a theory which could be logically carried to the extent of reducing the judiciary to the substantial status of a legislative committee. In New York, and in any other states where such anomalous view may have been sanctioned, the need of constitutional amendment, setting the courts on their proper legs, is imperative. And it is thought that enough has been said to show the desirability of some express constitutional regulation of the contempt function in all the states.

Thus far we have treated of efforts by legislature to weaken the right arm of the courts. The authority of the executive to paralyze it, through the pardoning power, is well settled and generally conceded. In the year 1841 one Dixon was adjudged guilty of contempt by the Circuit Court of the United States for the District of Mississippi, and a fine was imposed. Upon his application to the President of the United States for a pardon, the question of the President's authority in the premises was referred to the Attorney-General, Mr. Gilpin, who decided that the pardoning

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<sup>1</sup> 101 N. Y. 245.



power extended to the case. He said in part: "If we adopt, as the Supreme Court of the United States has decided we should do, the principles established by the common law respecting the operation of a pardon, there can be no doubt it may embrace such a case. A pardon has been held to extend to a contempt in Westminster Hall, under circumstances not materially different from those which occurred in the case submitted to the President. I am therefore of opinion that, should the President consider the facts such as to justify the exercise of his constitutional power to grant reprieves and pardons for offences against the United States,' there is nothing in the character of this offence which withdraws it from the general authority." With all due respect, we do not think that the precedent from Westminster Hall should be taken as controlling. This may seem inconsistent, as it has been argued above that, in determining the inherent power of the courts to punish for contempt, the law as it existed and was administered in Westminster Hall is to be followed. But the cases are widely different. American constitutions have not attempted to define the essentials of courts and their jurisdiction except by bodily adopting English models. The federal Constitution, after creating the Supreme Court and granting "judicial power" to it, and other tribunals to be established by Congress, confers their most important jurisdiction by the provision that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties." In ordinary parlance "equity" is an abstract term, connoting natural justice. As used in the Constitution "equity" is a concrete historical term signifying the system of jurisprudence administered by the English Court of Chancery. The vast and varied chancery powers administered by the federal courts to-day have for their basis the portion of the clause above quoted, extending the judicial power to cases in "equity." So, in the earliest constitution of New York, adopted in 1777, the existing judges of the Supreme Court and chancellor were by implication continued, a Court of Errors was created, after the model of the English House of Lords, and it was provided that, although the judges of the Supreme Court and chancellor shall be members of that tribunal, the former shall not have a voice in the actual determination of an appeal from a decree in "equity," and the latter shall not have a voice for the actual affirmation or reversal, on a question of law, of a judgment of the Supreme Court. What constituted "law" and what "equity," and what, therefore, were the respective characters and

jurisdictions of the Supreme Court and the Court of Chancery, were taken for granted. That is, the corresponding English institutions, with certain minor modifications, were adopted. In the successive constitutions of New York the same method of merely historical description and definition of courts and their jurisdiction is in the main followed. And the same is generally true of state constitutions as a class. It was the intention to transplant the English juridical entities in their substantial integrity. Without recognizing such intention constitutional judicial provisions would have been worse than inadequate; they would have been practically meaningless. It is therefore not only legitimate, but absolutely necessary, to go back to Westminster Hall for inherent judicial power in America.

With regard to American executive departments the facts are different. If there was any one English feature which emphatically the American people did not intend to take over in its entirety, it was that of the executive head of the state. Some of the prerogatives of the English king, such as the pardoning power, were indeed expressly conferred upon the President and the governors, but the method of mere historical description and definition was not followed. The various functions of the executive office were particularly enumerated and defined. The incumbent was granted large actual powers of government, but powers which were hedged about with restrictions. The American executive office was a new creation, not a similar institution bodily adopted. The contemplation was that it should constitute one of three independent and coördinate departments. It follows that, while it cannot be said that English precedents on the pardoning power have no relevancy, they are not finally determinative, and have no force other than as illustrative arguments.

It is argued that contempt of court is "an offence against the United States," or, in other words, a "public offence," and therefore is expressly covered by the constitutional power and pardon. Contempt is, of course, a *public* offence, but it is a special kind of public offence. It is, like any infraction of law, an offence against the whole people, but, in addition and more important, it is an offence against the dignity and a defiance of the authority of the court. With the conviction of and sentence for an ordinary crime the function of the court ceases; upon conviction of contempt the court has a direct and vital interest in the enforcement of the penalty.

These considerations are advanced as reasons why, in constru-



ing a flexible instrument of general terms and outlining a general policy, the courts should not have given the most literal and comprehensive effect to the clause granting the President the right to pardon. As far as contempt was concerned, the courts might have held that the universality of the language was necessarily modified by the circumstance that the judiciary was intended to be an independent, coördinate department, and that this could not be if the executive in its discretion could render the most essential judicial process practically abortive. However, these arguments can now be advanced only in favor of an express change in the law. The constitution of New York grants the power to pardon "for all offences except treason and cases of impeachment." The language in the constitutions as a class is very sweeping, and it has been held with great unanimity that an executive's power extends generally to convictions for contempt. The most recent case on the subject, citing many previous authorities, is *Sharp v. State ex rel. Carson*, in the Supreme Court of Tennessee (January, 1899).<sup>1</sup> In all of the reported adjudications, so far as I have been able to discover, the pardon has been granted to relieve against the definite punishment for a consummated contempt. In such a case the analogy to an ordinary "conviction" of an "offence against the state" is more plausible, than where a person is adjudged in contempt for refusing to obey an executory mandate—to give certain testimony, for instance, in say a quo warranto proceeding to determine the title to a public office—and sentenced to imprisonment until he complies with the court's order. Yet, in the latter instance, there would have to be the same kind of a "conviction" as in instances of consummated contempt, and, under the general principles laid down, an executive would have power to pardon in one case as well as in the other. This might result in rendering a judicial mandate relating to the future nugatory, and prevent the enforcement of perhaps an absolutely essential step for the administration of justice in a pending proceeding. The recognition of the power of pardon, therefore, tends to make the courts creatures of executive will or caprice, and, in like manner as the concession of the authority of the legislature to regulate contempt, to disturb the theoretical adjustment of the American governmental tripod.

An impressive object lesson of the possibilities of abuse of the executive function in question was afforded by an episode in the political history of the state of New York. In the year 1891 there

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<sup>1</sup> 49 S. W. R. 752.

was a serious contest between the two great political parties for the control of the New York legislature. It was perceived immediately after the election that in the Senate the plurality either way would be very narrow. As to the candidates of three or four close districts, certain informalities in ballots used, and other alleged irregularities, were relied on to affect the canvass of votes and the consequent certificates of election to be given. These controversies were carried into the courts, and in Onondaga County one Thomas J. Welch, a member of the Board of County Canvassers, was adjudged guilty of contempt, and punishment imposed on him for disobedience of a judicial order relative to the canvassing of votes, and he was forthwith pardoned by the governor.<sup>1</sup> The governor was one of the most active and influential politicians, and the leader of his party in the state, and the disobedience of the court's order operated to his party's advantage. It scarcely seems that anything needs to be added to the bare statement of this case. It is true that the governor in his explanatory memorandum charges an abuse of judicial authority. If there were any grounds for this accusation they should have been laid before the assembly, to be considered on the question of impeaching the judge. As matter of fact, the imputation — one of the gravest that could be made if taken seriously — was not, and, under the circumstances, scarcely could have been, regarded as anything but a bit of the ordinary theatrical arraignment of the other side indulged in by partisans in the heat of a political campaign. Fortunately incidents such as the one described have been rare, but there is no good reason for relying upon the continuance of such good luck. It is perfectly possible for a governor to powerfully influence, if not actually control, the issue of close elections by nullifying the action of the courts. It is a truism that purity of the elective franchise is indispensable for the survival of democratic government; and how can such purity be preserved save through the courts? The writer has always advocated the extension of the jurisdiction of the courts even to cases of contested elections in legislatures and Congress. It is notorious that, under the present system, members are constantly seated by a strict party vote, under circumstances which would irredeemably blast the reputation and the official career of a judge who rendered a similar decision. Certainly, cases of disputed elections at the polls imperatively require for proper determination the tradi-

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<sup>1</sup> Public Papers of Governor David B. Hill, 1891, p. 270.



tional non-partisanship, conscientious care and regard for settled principles of law, which in Anglo-Saxon communities are associated with the judicial office. And a governor who evinces strong and brilliant executive qualities on great occasions may, with something of the same impunity as an average member of a legislature, use his official power to promote the advantage of his party and his own political future. His capabilities of mischief are greatly increased through his control of the action of the courts. His authority in this respect is an anomaly in American institutions. Under our theory of departmental checks and balances, a governor should no more be permitted to pardon upon conviction for contempt than the courts should be suffered to control executive acts by mandamus or injunction. To this general statement there is one exception. The constitutions grant to the President of the United States and the state governors the right to suspend the writ of habeas corpus when, in cases of rebellion or invasion, the public safety may require it. The wisdom of this contingent function of the executive is probably at the present day generally conceded. And pardon for commitment for contempt is an executive act of the same class. In both cases one of the three departments invades the province of another department. The same circumstances of public exigency when *inter arma silent leges*, should be required to exist before the executive may override the judiciary by either method.

In his chapter on "State Constitutions" in *The American Commonwealth*, Mr. James Bryce refers to the tendency of constitutions to grow longer with each revision, larger because of popular distrust of ordinary legislators and the desire to curb them by organic law. Mr. Bryce cites a ridiculous instance in which a constitution goes even so far as to regulate the supply of stationery and fuel for the use of the legislature. In advocating—as is the purpose of the present paper—the constitutional regulation of contempt of court, the imputation is not incurred of seeking to lug ordinary legislation into the fundamental law. According to Mr. Bryce's analysis and classification, contempt of court falls within one of the scientifically proper parts of a "normal constitution,"—"the frame of government,—*i. e.*, the names, functions, and powers of the executive officers, the legislative bodies, and the courts of justice." Nor would the proposed reform necessarily lead to great extension of length, or very elaborate and minute provision in constitutional articles devoted to the "frame of the

government." As to the character, jurisdiction, and function of courts, it would probably not be well to depart from the brief historical forms of definition which proved sufficient in the beginning, and have now been rendered practically definite by custom and adjudication. But, in addition, there should be expressly provided that courts of general jurisdiction shall have such powers to punish for contempt as were exercised by the courts of King's Bench and Chancery at the time of the Revolution, and that courts of limited jurisdiction shall have similar plenary powers when acting within their jurisdictions. Probably it would be well to expressly inhibit legislation on the subject of contempt, and certainly the executive should be disqualified from pardoning persons committed for contempt except under circumstances which would now authorize the suspension of the writ of habeas corpus. There should also be inserted a certain limitation upon the court's own powers. In cases of what has been termed "executory" contempt—the refusal to perform some interlocutory act, such as to testify in a legal proceeding—the court's power should be without limitation. In a contested will case in the city of New York several years ago, an old family servant, with a stoical loyalty that won her a great deal of sentimental admiration, spent several months in jail rather than answer questions affecting her employers or touching family secrets. It should not be within the power of a recalcitrant witness to clog the wheels of justice through the alternative of suffering a definite brief term of confinement. Interested parties would frequently be willing to offer a sufficient pecuniary indemnity for the temporary withdrawal from society. In one of the decisions above cited, as confirmatory proof of the general moderation and propriety with which the power to punish for contempt has been exercised, the court shows that only in two states has an attempt ever been made to constitutionally limit the inherent judicial power. Even if the judicial discretion were made absolute as to consummated as well as interlocutory contempt, it would not be abused except in exceptional cases. But to guard against cruel and unusual punishment in rare cases, as well as for completeness of legal form, constitutions should prescribe arbitrary limitations where the penalty imposed relates to a closed transaction, and thus is merely vindicative of the court's authority and dignity.

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## THE NEW GERMAN CIVIL CODE.

THE enactment of the new German Civil Code, the *Bürgerliche Gesetzbuch*, took place on August 18, 1896, but the act provided that it should not take effect until the first of January, 1900. It was necessary to allow the legal profession to become familiar with the new law, and it was deemed proper that the date chosen for the beginning of its actual operation should mark the significance of the event. The year 1900 brings to Germany the consummation of legal unity, which confirms the political unity achieved thirty years ago.

To the greater part of Germany the new Code does not mean a transition from unwritten to written law. The common law, which is the Roman law considerably modified by German institutions, customs, and statutes, had to yield in many territories to various codifications, emanating from one or the other of the many sovereignties which divided Germany. Of these codes, the most important were the Prussian *Landrecht* of 1794, in force in the greater part of Prussia, the Saxon Code of 1863, and the Code Napoleon of 1804, which had been adopted in all parts of Germany west of the Rhine, and, in an official translation, in the Grand Duchy of Baden. In many other places, local statutes and customs had partly superseded the common law, producing in some matters a perfect chaos of legal systems. A memorial presented by the German government to the Reichstag to accompany the proposed Code, which was in 1896, gives a summary of the geographical distribution of law in Germany. Besides the great codes, it enumerates thirty of the "more important" legal systems. Thirty-three per cent of the Germans had their laws written in Latin, fourteen per cent in French.

The German Imperial Constitution of 1871 enumerated among the subjects of federal legislation the law of obligations, crimes, commerce, bills of exchange, and procedure. The commercial law and the law of bills and notes had already been codified under the German Federation of 1815, and the codes had become law by the concurrent action of the several states. These two codes were simply reenacted as federal statutes. Efforts were made from the beginning to enlarge the scope of the federal legislative power so

as to make it cover the whole of the private law, and the agitation for this purpose commanded the support of large and increasing majorities in the Reichstag. The state governments represented in the Federal Council hesitated somewhat, but early in 1873 the federal government declared in the Reichstag that the unanimous consent of the state governments to the required constitutional amendment might be expected. On December 30, 1873, the amending act became a law. It extended the federal power of legislation over "the entire civil law, the criminal law and procedure."

It had become settled by this time that the power would be exercised by codification, and not by the enactment of a series of special statutes covering limited topics. The criminal law had already been codified, and draft codes of criminal and civil procedure were under consideration and became law in 1877.

In undertaking the codification of the private law, the government proceeded with a deliberation and thoroughness corresponding to the magnitude of the task. A preliminary commission of five superior judges was first appointed to make suggestions as to the method to be pursued in framing a draft code. One of the principal recommendations made and adopted was that the preparation of the Code should not be left to the regular staff officials of the German government, who usually draft the legal measures submitted to the legislature, but that a commission *ad hoc* should be created, to consist of judges, officials of the department of justice, and law teachers at the universities, with power to employ special assistants, and to call for information on the authorities of the several states. It was contemplated that the different parts should be drafted by individual members of the commission, the whole then to be revised by the commission sitting together; and that the result should be published for criticism and suggestions, to serve as a basis for a second reading.

In July, 1874, the Federal Council appointed a commission of eleven members, of whom nine were practical jurists (judges and high officials), and two university professors. The chairman of the commission was Dr. Pape, the president of the Imperial Commercial Court, the highest federal tribunal at the time.

The commission began its sessions in September, 1874, and the next six years were devoted to the work of preparing preliminary drafts of the five main divisions of the Code, each of which was assigned to one member. During this time the draftsmen met weekly, but the commission as a whole had only annual sessions of



comparatively short duration. The work of the whole commission began in 1881 and ended at the close of the year 1887, when the first draft code was submitted to the chancellor. Thirteen years had thus been spent upon its preparation.

The draft, together with a condensed edition of the explanatory notes, was published in 1888. These notes, called "Motive," fill five volumes of about four thousand pages in the aggregate, while the unpublished original notes are far more voluminous. Even the abridged edition contains an enormous mass of material, and undoubtedly forms the most valuable treatise on comparative jurisprudence ever published.

The first draft called forth a flood of papers, pamphlets, and books, and there was probably not a legal writer in Germany who did not contribute his share of criticism. Criticism of course had been invited by the publication, and was its main object; but the commissioners could hardly have expected, after the painstaking and conscientious labor of many years, to find that the criticism was in the main unfavorable. Ample tribute was paid to the care and learning displayed in every part of the codification; but exception was taken both to its form and to the general spirit of its provisions. The wording was regarded as abstruse, clumsy, and in many respects not easily intelligible; and it was unfavorably compared to the lucidity and simplicity of the French Code. It was urged that the Code should be a guide to the people, as far as the nature of the material allowed, and that its language should be plain and popular in the best sense of the word. As for the general spirit of the provisions, it was contended that it was too Romanistic, and not sufficiently German in character, and that it failed to do justice to the social requirements of the age. The word "social" has obtained a great vogue in matters of legislation in Germany, and has become one of the catchwords of political discussion; it refers chiefly to the condition of the laboring and other economically dependent classes, and, in connection with the Civil Code, meant that the extreme assertion of the right of property and the liberty of contract should be restrained, especially in the matter of debt and employment. Professor Gierke, of Berlin, a jurist of rare learning and ability, and a strong believer in the "social" superiority of German over Roman legal ideas, wrote a book entitled "The Draft of a Civil Code and the German Law," which is the clearest and most eloquent summing up of the various objections brought against the proposed Code, and probably also the most readable account of its leading provisions and principles.

The government regarded the force of adverse criticism as sufficient to recommend an entire recasting of the first draft, and this work was intrusted in 1890 to another commission of twenty-two members, partly jurists, partly economists, and partly experts in different branches of trade and industry. This commission adopted the plan of keeping the public informed of the progress of its deliberations and of all conclusions reached, thus getting the benefit of criticism and advice as the work was progressing and before its results were presented as a whole. The second draft was published in 1894, this time a simple text without explanatory notes; but the minutes of this commission are in course of publication. The first draft had been used as a basis, but a great many changes were made both in form and substance. It is known that the technical improvements are largely the work of Professor Planck, of Goettingen. Its superiority over the first draft is generally acknowledged, and in the matter of language must be apparent to any one.

The second draft went to the Federal Council for discussion in October, 1895. A memorial containing brief comments upon the several provisions of the Code was published by authority in 1896. On January 17 of that year the Code was submitted to the Reichstag, and by it referred to a committee of twenty-one members, which had fifty-three meetings and reported on June 12. The discussions in the body of the House on the second and third reading occupied the month of June, and the act was passed by a large majority on July 1. On August 18, 1896, the Emperor promulgated it in the Imperial Gazette, thus completing the constitutional requirements of enactment; but, as already mentioned, the act itself postponed the time of its taking effect to January 1, 1900.

It is not possible to give in this article anything like a complete analysis of the Code, and I shall therefore merely attempt to give a very general idea of its system, and to illustrate by some of the more striking provisions its policy and principles.

The scope of the codification is indicated by its main divisions. These are, besides a general part, the law of obligations, the law of property, the law of family or domestic relations, and the law of inheritance. A separate introductory Act contains in its first chapter a concise statement in thirty-one sections of the principles of the so-called Conflict of Laws, as they are to be administered by German courts. This, I believe, is the first authoritative codification of an interesting branch of the law of rapidly growing importance. The scope of the Code is materially limited by the omission from it of most of those matters which had been previously regulated



by other imperial laws; above all, the whole commercial law, the law of bills and notes, of shipping, of common carriers, insurance, patents, copyright and trade-marks and bankruptcy. It thus appears that for many of the most important business transactions reference must be had in the first instance to separate statutes, and only for more general principles, such as joint parties, assignment, release or rescission, to the law of obligations as regulated by the Code. The general part contains a chapter on corporations, but as all business and public corporations fall under special laws, this chapter relates almost exclusively to organizations of a social character, and to incorporated trusts. In the law of property, important reservations have been made in favor of the local laws of the several states, while the books on family law and on inheritance cover their respective subjects almost completely.

The general part contains a miscellaneous collection of provisions which did not seem to belong exclusively to any one of the four other books. They relate to the following subjects: Natural and juristic persons, different kinds of property and appurtenances, acting capacity, void and voidable acts, offer and acceptance, conditions, agency and ratification, time, limitation and prescription, and private means of redressing wrongs and securing rights. In connection with the law of persons, the Code regulates fully the matter of presumption of death from absence, and establishes novel principles on two other points: it recognizes that a person may have his domicil at two different places at the same time (§ 7), and it protects the members of a family against the unauthorized use of the family name by a stranger (§ 12).

Upon the fundamental question, what constitutes a legal wrong? the Code takes on the whole an advanced position. Section 226 provides that the exercise of a right is not allowed where its only purpose can be to inflict injury upon another, and § 826 says that whoever intentionally inflicts injury upon another in a manner contrary to the common standards of right conduct (in einer gegen die guten Sitten verstossenden Weise) shall be liable for damages. This is a full recognition of malice as a cause of action, and it may perhaps be carried to dangerous applications. The extreme assertion of the right of ownership is further checked by providing (§ 905) that an owner cannot forbid encroachments upon his property made so high above or so far below the surface as not to affect his interests, and (§ 904) that he cannot forbid encroachments necessary to avert a present danger of injury disproportionately greater than the injury to the property, leaving, however, to the owner a claim for

actual damages in the case last mentioned. This latter provision sanctions what would be under most legal systems a technical wrong committed with practical impunity, and is characteristic as showing how careful the Code is to avoid a conflict between legal right and common sense. The same "social" spirit which has dictated these checks upon the abuse of ownership also restrains the liberty of contract by the rule, found in § 138, avoiding any contract which through exploitation of the improvidence, inexperience, or the necessities of the obligor exacts a manifestly excessive return for the consideration moving from the obligee. This provision, which was added by the commission of the Reichstag, is in addition to the prohibition of professional usury, which is covered by separate legislation. In view of these restrictions on the rights of property and liberty, it is interesting to note that the Code recognizes redress by private act by allowing a claimant to take, destroy, or damage property, or to arrest the person obligated if there is danger of his escape, or to overcome by force resistance to an act which a person is under obligation to suffer, provided in all these cases that authoritative aid cannot be obtained in time to avert the danger of losing the claim, or having its realization unduly jeopardized (§ 229).

It is remarkable how brief the Code is on the subject of torts; only one chapter of thirty-one sections is devoted to the matter. a large number of torts are covered by the simple provision that every one is liable for the damage he does by an illegal, intentional, or negligent violation of the life, body, health, liberty, property, or other right of another (§ 823). Special provision is then made for libel and slander and seduction (§§ 824, 825). Liability for the acts of servants and wards, and for damage done by animals, is regulated, and full provision made regarding the measure of damages.

For permanent personal injuries impairing the earning capacity of the injured, compensation is made as a rule by periodical payments, and only for special reasons by a lump sum (§ 843). Where an injury inflicted affects body, health, liberty, or female honor, the damages recoverable are not limited to pecuniary loss (§ 847). The Code recognizes a qualified liability upon equitable considerations of a child or a *non-compos*, saving to him sufficient means to support him according to his station in life (§ 829). In cases of contributory negligence, damages may be awarded according to the comparative degree of fault (§ 254).

With regard to contracts, the general rule, following the principle previously adopted by the Commercial Code is that no form is



required for their validity. Of the exceptions to this rule, the most important is that of contracts for the transfer of real estate, which require judicial or notarial authentication (§ 313). It may be mentioned here that a similar authentication is provided for in the case of wills; but a will may also be validly made by a declaration written, signed, and dated in the testator's own hand (§ 2231). In accordance with the principles of the civil law, a consideration is not essential to a valid contract, but absence of a lawful ground for a promise is a good defence to its enforcement (§ 821). In case of mistake as to the substance of any legal act, the act is voidable, but the party avoiding it is liable to the other for the damages which the latter has suffered by a justifiable reliance upon its validity (§§ 119, 122). A contract may be made for the benefit of a third person so as to give him a right of action (§ 328).

The provisions regarding special classes of contracts contain many interesting points, a few of which may be mentioned. The performance of a promise of a gift may be refused, if it would leave the promisor without adequate means of support according to his station in life (§ 519); every such contract, moreover, requires judicial or notarial authentication (§ 518). The promise of a loan may also be revoked if the borrower's solvency is unexpectedly impaired (§ 610). It is provided that in brokerage contracts the right to a commission is forfeited by the broker's acting for the other party contrary to the spirit of the transaction (§ 654). A marriage brokerage contract does not entitle to a commission, but a commission paid under it cannot be recovered (§ 656). Under wagering contracts we find the rule that where a contract for the purchase and sale of commodities or securities is made with the understanding that only the difference between the contract price and the market price at the time set for delivery is to be paid by the loser to the winner, such contract is to be regarded as a wagering contract; *i. e.*, it is void, but what has been paid in accordance with it cannot be recovered (§ 764). The title on the contract of service gave rise to extended discussions in the Reichstag; perhaps the most noteworthy provision is that every contract of service made for life or for a longer term than five years may be terminated after the lapse of five years on giving six months' notice (§ 624). The Social Democrats had moved to reduce this period to one year. The Code treats all kinds of service alike, except that the right to terminate is somewhat varied according to the grade of service; but the great bulk of labor legislation is covered by special statutes,

commercial clerks and sailors stand under the Commercial Code, and domestic service is left to the law of the several states.

The third book of the Code dealing with property is largely taken up with the law of real estate. In the creation and transfer of rights in real estate, the principle of registration is strictly applied; and registration does not merely serve the purpose of notice, but is the essential step in passing title (§ 873). The technicalities of recording are regulated by a separate statute. Mortgages may be created without personal liability, and property can be burdened with the payment of rent charges, which, however, cannot be made perpetual (§ 1202). It may be mentioned here that, while the recognition and regulation of estates entailed in perpetuity is left to the local laws, the Code provides for ordinary cases that a remainder cannot be limited to take effect at a time later than thirty years after the testator's death, unless it is limited upon an event happening to a particular tenant or remainder-man who is living at the death of the testator (§ 2109).

As to personal property, the law of pledge is very fully regulated, and quite elaborate rules have been enacted to determine how lost and found property is to be dealt with. The German law does not allow the title to property to be transferred by mere consent, but requires, as the Roman law did, delivery (§ 929). Another principle of great importance is that title to personal property passes if the property is acquired in good faith from one having possession, provided that the owner had not lost his possession by theft or accident (§§ 931-935). In other words, the owner of personal property, by intrusting its possession to another, puts it in the power of the latter wrongfully to dispose of the title; a *bona fide* purchaser for value being absolutely protected; while a *bona fide* taker without consideration is liable to the owner on the theory of unjust enrichment (§ 816). These rules regarding title to personal property correspond to the maxim of the French law: "En fait de meubles possession vaut titre."

The law of family relations is introduced by a declaration to the effect that a promise to marry is not actionable, and that stipulations for a penalty for breach of promise are void; but damages may be recovered for actual loss and expenditures incurred, unless the breaking off of the engagement was justified by important reasons (§§ 1297, 1298). The enactment of the Code furnished an opportunity to reopen the question of the civil marriage, which had already been decided by a law of 1874. The government took a



firm stand, declaring that it would sooner see the whole Code lost than abandon the absolute requirement of marriage before a civil officer. All that the Catholic party and the other enemies of compulsory civil marriage could obtain was the insertion of a section declaring that religious obligations regarding marriage were not affected by the Code (§ 1588), a provision without legal significance, but of possible moral value.

There are some interesting provisions regarding personal rights and obligations incident to marriage. The husband is given power to determine all questions touching marital life, especially domicile and residence, provided that this power is not abused (§ 1354); the wife is given the so-called power of the keys; *i. e.*, she manages the domestic affairs, but subject to the husband's power, so that the recognition of her right amounts in reality only to a presumption, valuable especially in binding the husband to acts done by the wife within this sphere (§§ 1355-1356). The obligation of the wife to render services in the household or in the husband's business depends upon the customs prevailing in their station of life (§ 1356). The duty of support and maintenance falls primarily upon the husband, secondarily upon the wife (§ 1360.)

Proceedings to annul a marriage may be brought on the ground of essential error or deception; but deception regarding the pecuniary condition of either party cannot be relied upon (§§ 1339, 1340). The recognized grounds of divorce are: adultery and certain offenses against morality; attempts upon the life of husband or wife; desertion; grave violation of marital obligations, or infamous conduct making further common life intolerable; and finally incurable insanity. Perhaps no other provision of the Code was so hotly contested as the recognition of this last ground of divorce; the Reichstag struck it out on the second reading of the bill, but reinstated it on its final passage.

Another controversial point was the regulation of the property relations between husband and wife, a matter in which there had been the most bewildering diversity of local customs and statutes, so that in some cases different systems prevailed in different parts of the same city. A strong plea was made for the principle of separate property rights of married women, and the women's clubs and societies pronounced in favor of it; but the prevailing opinion was that, while this might be the system of the future, for the present it ran counter to German ideas and customs, especially among the peasant classes; and the Code declared in favor of the

system by which the husband obtains the income from the wife's estate, and the power to manage all her property according to his discretion; but the Code allows the adoption by agreement of the system of separation of property, as well as of some modified systems of community, which it likewise regulates in full.

The treatment of the law of property incident to marriage shows the conservative character of the codification. The consolidation of many different systems of private law into one made changes inevitable, and the opportunity was taken of introducing a considerable number of reforms; but radical departures from existing conditions were avoided, and the fact that some principle generally prevailed through the greater part of Germany was in most cases accepted as conclusive in favor of its adoption. This conservative policy of the codifiers undoubtedly facilitated the passage of the act through the legislature.

It is true that a considerable amount of controversial matter was eliminated by leaving to local law or to separate federal statutes nearly all relations of a public or quasi-public character. The Code naturally abrogates an enormous mass of local law, by which hitherto the great bulk of civil relations had been regulated; but the Introductory Act enumerates a long list of matters with regard to which local provisions are to remain untouched, including perpetuities and restraints on alienation, statutes of mortmain, religious societies, the law of mines and waters, of fish and game, of insurance, of author and publisher, nearly all property relations between the individual and the state, and nearly all public or semi-public property. The amount of separate federal legislation in matters of property is likewise very large, the Commercial Code alone covering many of the most important transactions of business life. The many questions that must arise as to the relation between the Code and the rival laws thus left in force have as far as possible been expressly regulated. In order to bring the other federal laws into harmony with the principles of the Code, nearly every one of them has been amended in important particulars, and a revised version of the Commercial Code has been enacted. Similar work is being done in the several states.

The enactment of the Civil Code nearly concludes the work of systematic codification which has been going on in Germany during the last fifty years, and which the annals of legal history parallel only in the legislation of Justinian and that of Napoleon. The Civil Code is properly regarded as the climax of this work; for in every



system the private law is the foundation of jurisprudence and the most mature expression of the reason of the law. Being more independent of conditions of time and place than other branches of the law, it has preëminently the character of a fundamental and permanent law. The civil law of Rome has spread over Continental Europe, and has retained its authority for many centuries; the French Code has been largely adopted by other countries; and even at this early stage of its history the German Code has been made the basis of the codification of the private law of Japan. There is no reason why the German codification should not have its influence on civil legislation in the countries of the common law. We are apt to notice the differences between the common and the civil law far more than the many features they have in common; but the latter are the more important, and perhaps the most striking differences between the two legal systems are due to accidents of historical development rather than to fundamental or irreconcilable views of legal policy. Problems of private law must be ultimately settled upon purely rational principles, and these are essentially the same where fundamental economic conditions are alike. It is this element of universality and permanence in the principles of private law which gives to such a work as the German Civil Code an interest and an importance extending far beyond the territory of its immediate operation.

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UNIVERSITY OF CHICAGO,  
December, 1899.

## THE RIGHT TO LOCAL SELF-GOVERNMENT.

## III.

THE supremacy of the town in Rhode Island is also evidenced by the insignificant rôle the county has always filled in this state.

The first division into counties was in 1703.

"Be it further enacted by the authority aforesaid: That there shall be two inferior Courts of Common Pleas to be holden on the main land for her majesty, early in the county known by the name of Providence Plantations; and that it shall be held at Providence first as the shire town; and next at the town of Warwick."<sup>1</sup>

"Be it further enacted by the authority aforesaid: That Rhode Island, with the rest of the islands within the said Collony, shall be a county by the name of Rhode Island County; and that Newport be the shire town."<sup>2</sup>

It will be noticed that here there was no incorporation of the counties — they were merely geographical divisions of the colony. Washington County, originally called the Narragansett country, was created next, in 1729, as King's County.<sup>3</sup> The act is entitled "An act for the dividing the colony of Rhode Island and Providence Plantations into three counties . . ." (Newport, Providence, and King's County), and was passed because "the more remote inhabitants are put to great trouble and difficulty in prosecuting their affairs in the common course of justice, as the courts are now established," and this is the only end achieved even now by the division of the state into counties. The name of this county was changed to Washington County in 1781.

The next county created was Bristol County, in 1747,<sup>4</sup> and the fifth and last county was Kent County in 1750.<sup>5</sup>

But although we speak of these counties as incorporated (it is noteworthy that not all of these acts do so), they are not corporations in the sense that towns are corporations; for in Rhode Island everything is done by the towns and nothing by the counties.

There are no county commissioners, no county records, no county

<sup>1</sup> 3 R. I. Col. Recs. 477 (1703).

<sup>2</sup> *Ib.* 478 (1703).

<sup>3</sup> 4 R. I. Col. Recs. 427.

<sup>4</sup> 5 R. I. Col. Rec. 208.

<sup>5</sup> *Ib.* 302.



taxes, no county roads, no county probate courts, in Rhode Island. All these things are and ever have been managed by the towns. The only county officers are the clerk of the Supreme Court and Court of Common Pleas, who has the custody of the papers of these courts when they meet in the different counties; the sheriff of the county, whose writ, however, runs throughout the state; and the keeper of the county jail, who, in other than Providence County, is the sheriff of the county. A county can neither sue nor be sued in Rhode Island, as a town can, and is not a corporation.

The power of the town over its own probate matters is another mark of the supremacy of the town in Rhode Island and of the continued retention of an original power. Until the acceptance of the charter, in 1647, each town had jurisdiction over probate matters arising in the town, as it had over all other judicial matters.

In "that remarkable piece of colonial legislation, the code of 1647,"<sup>1</sup> passed at the first meeting of the general assembly, we find<sup>2</sup> a statute concerning the probate of wills, conferring this power upon "the head officer of the Towne," whom we should now call the president of the town council, and who was the chief executive of each town.

In 1675 it was

"Voted, whereas by law of this collony (in the letters thereof in the said law) bearing date in the yeare 1647, said saith the probate of wills, was to be before the head officer, which said name (in the said law) by the present constitutions is extinct, and by reason of difference of opinion probation of wills is deferred; and for that the thinge is as weighty as to make a will for the dead, dyinge without a will, and the said supposed head officer may be in his own case; therefore be it enacted, that the power of probation of wills shall be in the Towne Councill or major part of each, to which it doth belong."

This law plainly recognizes and restores a former custom, and as thus established it has continued to be the law even until now, special town or city probate courts being instituted by the general assembly only as increase of population requires. A right of appeal from these probate courts to the Supreme Court has always existed and is still a part of the judicial system of this state.

There is no escheat to the state in Rhode Island if one dies leaving no heirs. Ch. 217 Gen. Laws of R. I. provides that if a person die leaving real or personal estate without leaving any

<sup>1</sup> Gleanings from the Judicial History of Rhode Island, by Judge Durfee, 6.

<sup>2</sup> 1 R. I. Col. Recs. 188.

<sup>3</sup> 2 R. I. Col. Recs. 525.

known heir or personal representative to claim either, the town council of the town in which such real or personal estate shall be may direct the town treasurer to take such estate into his possession for the use of such town until the heir or other legal representative shall call for it. Upon evidence shown, the town treasurer shall account with the claimant for such real or personal estate, but not for any interest or income received therefrom. It is to be remembered that in Rhode Island the word *town* in the statutes includes *city*, unless it is otherwise specified, which in itself is interesting evidence to the effect that there is no essential difference between a town and a city in this state.

The statute in question may be traced back to 1768, and even then it was not anything new. The statute then passed but recognized what had ever been the custom in Rhode Island. It was only declaratory of the law as it had always been in this state.

Another mark of the supremacy of the town in Rhode Island is found in the fact that each town continued to admit freemen of the town after union under the first charter all through its life, after acceptance of the second charter, until a late day. Even the first charter of the city of Providence (1832) continues this old order of things, providing in sec. 10 that the Board of Aldermen and Common Council in joint meeting may admit freemen of the city. The term "freemen of the colony," in the sense of freemen of the united colony, is believed to have been first used in an act of the general assembly in 1665,<sup>1</sup> declaring that those who take the prescribed engagement to his Majesty the King to bear due obedience unto the laws established from time to time in this jurisdiction by the general assembly shall be admitted freemen *of the colony*. It was also ordered "that the foresaid engagement shall be administered to all that are already admitted freemen within this jurisdiction, either now, in this Assembly, or in a towne meeting of each of the respective townes of this Collony."

"It was the practice to admit as freemen those whose names were sent in for that purpose by the clerks of the respective towns as well as those who personally appeared before the Assembly, being duly qualified."<sup>2</sup>

In 1670 the general assembly passed an act that each town shall make freemen of the town such as they shall judge capable to do public service in bearing office therein, whether such persons desire it or not.<sup>3</sup>

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<sup>1</sup> 2 Col. Recs. 112.

<sup>2</sup> 1 Arnold, Hist. R. I. 327.

<sup>3</sup> 2 Col. Recs. 357.



"It was the custom to organize (the general assembly) on the day previous to the election, in order to admit freemen. Those who had been received as freemen of the towns were, on these occasions, made freemen of the colony."<sup>1</sup>

That is to say, one might be a freeman of the town or of the colony or of both. This furnishes us with still another striking illustration of the retention of original power by each town long after the united colony was formed.

It was not until 1723<sup>2</sup> that the general assembly passed an act requiring a freehold qualification (of the value of one hundred pounds, or an annual income of two pounds derived from real estate) to entitle a man to become a freeman. The same year, 1723-24,<sup>3</sup> an act was passed restoring the former power of freemen of the towns who were not freemen of the colony to vote for deputies.

There might be citizens of a town, citizens of the colony or state, and now, under the Fourteenth Amendment to the Constitution of the United States, there may be citizens of the United States. The importance of this recognition of the citizenship, not of a state, but of the United States, has not yet been sufficiently recognized.

The first conception of public peace was that of local peace; after that, the conception of the king's peace, or the peace of the state, was adopted. It was not until 1889 that the legal conception of the peace of the United States was adopted by the Supreme Court of the United States.<sup>4</sup>

And now, in consequence of the Hague Conference of 1899 and its action, we are developing, for the first time, the conception of the peace of the world.

The life of the towns of Rhode Island has been continuous and uninterrupted since their respective settlements, that of Providence being in 1636; of Portsmouth, 1637; of Newport, 1638; and of Warwick, 1642-43. This cannot be said of the colony and state. In 1651 William Coddington, an uneasy and ambitious spirit, — the first judge in Portsmouth, 1638 to 1639, the first judge in Newport, 1639 to 1640, and the first governor under the union of these two colonies, from 1640 to 1647, — went to England, and, by means now impossible to discover, obtained from the council of state a commission to govern the islands of Rhode Island and Conanicut

<sup>1</sup> 1 Arnold, Hist. R. I. 453.

<sup>2</sup> 3 Col. Recs. 338; P. L. R. I. 131; 2 Arnold, 77.

<sup>3</sup> 3 Col. Recs.; 2 Arnold, 78.

<sup>4</sup> *In re* Neagle, petitioner, 135 U. S. 1.

during his life, with a council of six men to be named by the people and approved by himself. It made him the autocrat of the fairest and wealthiest portion of the colony, and put an end to the united colony for the time being. The alarm was great, and John Clark was appointed the agent of the island towns, Portsmouth and Newport, to procure a repeal of Coddington's commission; and Roger Williams was appointed the agent of the mainland towns, Providence and Warwick, to obtain a confirmation of the charter of 1643.

"In effect the same result was aimed at and secured, — a return to their former mode of government by a reunion under the charter."<sup>1</sup>

They succeeded in their mission, and upon receipt of intelligence of the repeal of Coddington's power a town-meeting was held in Providence, February 20, 1652-53, at which, in accordance with a request from the town of Warwick, a meeting of commissioners of the two towns was agreed upon. It was held at Pawtuxet the following week. They drafted a reply to a letter from the island towns of Portsmouth and Newport relating to a reunion of the colony, and appointed two members from each town to carry it and to consult with those of the island concerning the peace and welfare of the state.<sup>2</sup> But their labor was fruitless. The mainland towns contended they were the Providence Plantations, their charter never having been vacated and their government having continued uninterrupted by the defection of the island towns, and therefore the general assembly should meet with them. The island towns claimed the assembly should meet there because they formed the greater part of the colony, and hence had a larger interest in the matter.

The result was that two distinct general assemblies convened at the same time in 1653 and elected different general officers for the colony. So great was the feeling that the assembly at Providence disfranchised those who owned the validity of commissions to fight against the Dutch, issued by the other assembly. The dissension continued, and Sir Henry Vane wrote to the people of Rhode Island a most kind and imploring letter, urging them to reconcile their feuds, for the honor of God and the good of their fellow men.

"Are there no wise men among you? No public self-denying spirits," he asks, . . . "who can find some way or means of union . . . before you become a prey to enemies?" The interest that

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<sup>1</sup> 1 Arnold, 239.

<sup>2</sup> 1 R. I. Col. Recs. 239.



Vane took in this matter was due to his intimacy with Williams, and because mainly through his friendly intervention the parliamentary charter was obtained.<sup>1</sup>

At length a reunion was effected in 1654 by articles of agreement signed by a court or general assembly of six commissioners from each of the four towns, assembled at Warwick.

The administration or usurpation of Andors lasted two years and four months, from December, 1686, to April, 1689, during which time all the charter governments of New England were suspended.

Arnold<sup>2</sup> says:—

“The American system of town governments which necessity had compelled Rhode Island to initiate, fifty years before, now became the means of preserving the liberty of the individual citizen when that of the state or colony was crushed. To provide for this was the last act of the expiring legislature. For this purpose it was declared ‘lawful for the freemen of each town in this colony to meet together and appoint five, or more or fewer, days in the year for their assembling together, as the freemen of each town shall conclude to be convenient, for the managing the affairs of their respective towns, and that yearly, upon one of those days, town officers should be chosen as heretofore, taxes levied, and other business transacted at such meetings, as the majority should determine.’”<sup>3</sup>

It was the towns, with their continuous existence, that kept alive the vital flame and rescued it from the embers of the dying colony, after three years of suspension of colonial corporate existence.

We are in a better position now to call more particular attention to the analogy between the system of towns forming Rhode Island and the system of states forming the United States. This analogy is most remarkable. As the original thirteen states constituted the Union of the United States, so did the four original colonies or towns constitute the united colony, subsequently the state. As new states came into the Union upon the same footing as the old states, so new towns became a part of Rhode Island upon the same footing as the old towns. Out of the union of the towns arose the colony, subsequently the state, that afterwards admitted or created new towns. Out of the union of the states arose the United States, that, in its turn, created or admitted new states into the Union. Each town of this state and each state of the United States is supreme in its own sphere, each regulating and administering its

<sup>1</sup> Diman, *Orations and Essays*, 133.

<sup>2</sup> Vol. 1, p. 487.

<sup>3</sup> 3 R. I. Col. Recs. 191.

own internal affairs, thus constituting a hierarchy consisting of: 1, the town; 2, the state; 3, the United States. When a new state was admitted into the Union, its right to local self-government was reserved, as the thirteen original states had reserved it before them. So, when new towns were formed in Rhode Island, they became a part of the state upon the same footing with the four original towns, that is to say, they retained the right to local self-government by implication, since no distinction was made between the power of the original towns and of the new towns. So no distinction is made, once inside the Union, between an original state and a new state.

"The similarity between the New England confederacy of 1643 and the National Confederation of 1783 has been often remarked; but there is yet a stronger resemblance in the relative position of the four towns of Rhode Island in 1647 and the states of the Federal Union under the constitution of 1787."<sup>1</sup>

The admission of new towns to the union, with like powers as if they were original towns, still further marks this analogy: —

"This colony has, in fact, been a sort of microcosm, in which there have been developed, on a smaller scale, the more important issues which have operated in a large way on the stage of national government."<sup>2</sup>

In an address by George Bancroft, the historian, before the New York Historical Society, in 1866, he said: "More ideas which have since become national have emanated from the little colony of Rhode Island than from any other."

This power of the towns of this state to local self-government can no more be taken from the new towns than from the old towns; for all, once inside the united colony, or state, are on the same footing, just as all the states in the Union, new and old, are on the same footing. The existence of towns with powers of self-government was an admitted underlying fact when the parliamentary charter of 1643 and the royal charter of 1663 were granted, and there arose an unwritten constitution, through the continuous and uninterrupted usage of two hundred years, a part of which is the right of the towns in Rhode Island to administer their own local affairs.<sup>3</sup> The extent and variety of these powers of self-

<sup>1</sup> 1 Arnold, 211, note.

<sup>2</sup> Foster, *Town Government in Rhode Island*, 35.

<sup>3</sup> The constitution adopted in 1843, Art. V. Sec. 1, and Art. VI. Sec. 1, explicitly recognizes the existence of towns and of the city of Providence, then the only city in the state, and constitutes them the political units of the state. But this was nothing new. It was merely declaratory of what had always been the law and the custom in this



control by the towns of this state far exceeded those of the towns of any other state, and, unrecognized by jurists, they continue in force at the present day in something like their pristine vigor. Two reasons have contributed largely to long-continued ignorance of these powers, not only in Rhode Island, but similarly in other states throughout New England, New York, Pennsylvania, and other of the original states. In the first place, the success of the Revolution exalted the power of the states, causing forgetfulness of the fact that the towns contributed as much as the states to our success. But for Samuel Adams and the organized exertion by him and others of the powers of the towns throughout New England, the Revolution would have lost one of its most powerful supports. In the next place, the absence of printed records of the doings of the founders of our towns and colonies until a late day has prevented the growth of a body of lawyers trained in the constitutional law of their respective states. Only a few mousing antiquaries have known anything about these matters until within the last generation. Consequently there has not been any educated public opinion, even among those competent to pass upon such subjects, until lately, that could keep alive a knowledge of these principles and prevent encroachment upon them. Law after law by legislature after legislature in state after state has little by little restricted town powers in a way that cannot be defended. But the printing of the colonial records, even in their present imperfect shape, has made it possible for the lawyers of the present day to know much more about the development of the constitutional law in Rhode Island and in other states than the generations before us could possibly know.

Although the general assembly has undoubted power to pass general laws affecting all towns and cities alike, or upon the request of any one town or city, to give it additional power; although it may mould and direct by general laws all towns and cities, or even any one of them, upon request or necessity, — it is submitted that in Rhode Island towns are the recognized units of its political system; cities are but towns in which the increased population has rendered impracticable the control and regulation of local affairs by town-meetings and town councils, and the inhabitants have therefore petitioned the general assembly to place such control in a city council: a city in Rhode Island is but a town that

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state. It is submitted that had the written constitution been silent on this subject, as a part of the unwritten constitution of the state, the same rights of towns would have continued to be the law.

has asked for and submitted to a city organization; it is a political unit in which the control theretofore exercised by town-meetings has now, at their own request, become vested in a city council, with a mayor as the executive head.

If it has become desirable to change a town into a city, to change town boundaries or to divide a town to make two towns, the power thus to mould and direct has been exercised by the general assembly, but only upon the request of the parties in interest, and subject to their assent.

In England the civil divisions into counties, hundreds, tithings, and towns date as far back as Alfred the Great. They were substantially in existence before the Norman conquest. The Anglo-Saxon race carried with it everywhere their Teutonic institutions, their system of local self-government. "It is here they have acquired the habits of subordination and obedience to the laws, of patient endurance, resolute purpose, and the knowledge of civil government which distinguish them from every other government."<sup>1</sup> "The townsfolk themselves assessed their taxes, levied them in their own way, and paid them through their own officers. They claimed broad rights of justice, whether by ancient custom or royal grant; criminals were brought before the mayor's court, and the town prison, with irons and its cage, testified to an authority which ended only with death."<sup>2</sup>

But in England, as well as in the United States, there was a falling off from their former high estate. There, as here, there was no printed record of their ancient procedure and authority, no trained body of lawyers versed in the constitutional law of town rights. "Four hundred years later, the very remembrance of their free and vigorous life was utterly blotted out. When commissioners were sent in 1835 to inquire into the position of the English boroughs, there was not one community where the ancient traditions still lived."<sup>3</sup>

In 1813 the general assembly passed an act the title of which was significant: —

"An Act to enlarge and explain the powers of the Town meetings and Town-Council of the Town of Providence."<sup>4</sup>

This title shows clearly that the general assembly did not attempt to *confer* powers upon the town, but simply to *enlarge* and

<sup>1</sup> *State v. Denny*, 118, at p. 458.

<sup>2</sup> *Green, Town Life in the Fifteenth Century*, 2.

<sup>3</sup> *Ib.* 5.

<sup>4</sup> *Pub. Laws R. I.* 173, Oct. 30, 1813.



*explain* those it already possessed. The legislation was but declaratory of the common law of the state.

It is instructive to note how Providence, the only city in the state when the constitution was adopted, was changed from a town to a city: —

"In April, 1829, the proposition to adopt a city form of government was agreed to by the freemen by a vote of 312 to 222. The General Assembly of the state, in January, 1830, granted a city charter, with a provision that it should again be referred to the freemen, and, unless again adopted by three fifths of the persons voting, should not go into operation. The small majority in favor of it at first undoubtedly led to the introduction of this provision. On the 15th of February the freemen gave in their ballots on the question, 383 for the charter and 345 against it. Probably the town government, having withstood this attack, would have existed some years longer had it not been for 'the riot,' as it is called, in September, 1831." [Here follows an account of this riot, which we omit.] "Believing the whole evil to have arisen from the inefficiency of a town government, at a town meeting holden on the fifth day of October the freemen, without a dissenting voice, resolved that it was expedient to adopt a city form of government. They appointed a committee to draft a charter, consisting of John Whipple, Caleb Williams, William T. Grinnell, Peter Pratt, George Curtis, and Henry P. Franklin. This committee reported on the 12th of the same month. The meeting adjourned then to the 22d, to take opinion of the freemen by ballot on that day, resolving that, if three fifths should vote in its favor, that then the representatives of the town should be instructed to urge the passage of an act of the General Assembly granting the same. On the 22d, 646 freemen voted, 471 for, and 175 against, the change. The representatives of the town, therefore, according to their instructions, presented the subject to the consideration of the Assembly. Under these circumstances, the General Assembly granted the charter, to go into effect on the first Monday in June, 1832, if three fifths of the freemen voting at a town meeting, to be holden on the 22d of November then next, should be in favor of it. On the 22d of November 647 freemen voted on the question, 459 for and 188 against the city charter."<sup>1</sup>

Without citing the charter in full,<sup>2</sup> we call attention to it, and particularly to section 1: —

*"Be it enacted by the General Assembly and by the authority thereof it is enacted, that the inhabitants of the town of Providence shall continue to be a body politic and corporate by the name of 'The City of Providence,'*

<sup>1</sup> Staples, Annals of Providence, 396.

<sup>2</sup> Pub. Laws R. I. 760, Nov. 4, 1831.

and as such shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises, and shall be subject to all the duties and obligations now appertaining to or incumbent upon said town as a municipal corporation or appertaining to or incumbent upon the freemen and town council thereof, may ordain or publish such acts, laws and regulations as shall be needful to the good order of said body politic, and inflict fines and penalties for the breach thereof."

It will be seen from this that Providence, until 1853 the only city in the state, was not *created*, nor even *incorporated*, by the general assembly. It was simply *continued* as a body politic and corporate under another form of government. The town of Providence now became the city of Providence. It parted with no old rights to the general assembly, it acquired no new ones from it. The general assembly, at the request of the town of Providence and its voters, or freemen, to use the Rhode Island term, moulded and directed its name and form so that it became the city of Providence, with the necessary changes from town to city government. The origin of the broad powers in the charter of this city is obvious. They are but continuations and confirmations of the powers, not *conferred* upon the then town in 1813, but, as the act itself states, then "enlarged and explained." The origin of these powers, the fact that the town of Providence had exercised them before the state or even the colony was created, that the charters granted to the four towns immediately upon organization under the parliamentary charter were merely declaratory of the powers theretofore possessed by these four separate colonies, was known to the men who adopted this act in 1831. They did not attempt to confer new powers upon the town of Providence, — they again enlarged, explained, moulded, directed, and confirmed the powers the town already had, and at the request of the town itself they changed the town into a city. Having always had them, having always exercised them, having had them declared when the general assembly gave the town (and the other three towns) their first charters in 1648, having had them again admitted by the general assembly when it "enlarged and explained" them by the Act of 1813, continuing always to exercise them, having, at the request of its voters, changed the form of government from that of a town to that of a city in 1831, to have, exercise, and enjoy all the rights, immunities, powers, privileges, and franchises then appertaining to said town," the general assembly cannot take them away. Among these rights, immunities, privileges, and franchises, always exercised by the towns of this state, is



the appointment and management of the town police by the town itself, or by the town authorities thereunto authorized by the voters of the town.

Changes have been made from time to time in the charter of the city of Providence, generally at the request of the city, or, if made against its assent, then with the disapproval of those familiar with the history of the past.

The charter as it now stands shows the continued existence of the powers that the town had, even before the first charter. And what is here said of the town and city of Providence is equally true of every other town and city in the state. The state thus continued under an unwritten constitution until the existing constitution was framed and adopted in 1842. At this time the charter granted to the city of Providence in 1831 was in full force and effect. The right of the freemen of Providence, and of every town in the state, to manage their own local affairs was admitted and in full operation. The right admitted and in operation was the right to manage their own local affairs in the manner and within the broad limits within which, as we have seen, this right has always been recognized and admitted in this state. This broad right, exercised from the foundation of the four original colonies to the present day, in a broader and ampler way in this state than in any other state in the Union, is not prohibited in the constitution of the state, either expressly or by implication. On the contrary, the constitution says, Art. I. Sec. 23: "The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people." This right to local self-government, in the full and ample manner hitherto exercised in this state, therefore still exists. What is true of the city of Providence is true of all the cities and towns in the state. From the foundation of each town, whether before or after the united colony was formed, down to and at the time of the formation and adoption of the constitution in 1842, ever since and now, each town (and city) elected its own officers, collected its own tax, and spent its own money in the management of its own affairs, in the ample manner and with the full powers above shown. Each town and city was and is a little republic within itself, subject to the general laws of the state. It enacted its own ordinances, and enforced them through its own courts and its own constables. To call these constables by the higher-sounding metropolitan name of police officers gives the state no higher title to the right to appoint them, and to appropriate the money of the town to pay them. (Of course the state

may appoint state constables or police, and pay them; but whence the right to appropriate the money of the town for that purpose?) Each town managed its own health affairs through its own town council acting as a board of health for the town; and each town had its own court of probate, consisting of the members of its own town council. It made and kept up its own highways. It owned its own poor-farm for the support of its own poor. Each town still holds its financial town-meetings, where only those of its own voters, who are qualified to vote in the financial affairs of the town by the possession of property, decide upon the financial affairs of the town, and make specific appropriations for particular purposes, leaving the details only to the town council. All these things and many more ever were and still are done in this way by the towns of Rhode Island. The county, in this state, is a mere geographical term. There are not and never have been any county roads, any county taxes, any county commissioners, any county courts of probate, any county record office, any county organization. All these things have been managed in Rhode Island by the towns, or, when incorporated as cities, by the cities. There are no county officers, except the clerk of the Supreme Court and of the Court of Common Pleas "within and for" each county, who has the charge of these courts when they meet in the respective counties; the sheriff, whose writ runs throughout the state; and the keeper of the county jail (who, in other than Providence County, is the sheriff of the county). All these are state officers, being elected by the general assembly and paid by the state. The political machine has not yet thought of providing that these state officers shall be paid out of the money of the towns, while they shall not be under the control of the voters of the towns whose money shall thus pay them. Why should state police officers stand on any different footing?

Let us now examine some of the leading cases upon this subject.

The People *v.* Draper:<sup>1</sup> In this case it was held that the reservation contained in Sec. 2, Art. X. of the constitution of New York of 1846, to the electors or local authorities of the right to elect or appoint county, city, town, and village officers, relates only to such offices as existed when the constitution went into effect, and therefore that the legislature may create new civil divisions of the state embracing two or more existing counties, cities,

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<sup>1</sup> 15 N. Y. 532 (1857).



towns, or villages, providing the old civil divisions be not abolished. Consequently the act to establish a Metropolitan Police District, consisting of the counties of New York, Kings, Richmond, and Westchester, was upheld as constitutional. Each county was to pay its proportion of the expense of the police force into the state treasury, whence it was to be disbursed, with the use of the police property of New York and Brooklyn, by the new board, without compensation, but without change of ownership. The preëxisting system of police was abolished, together with the control over the police by the former authorities of the towns, cities, etc., of the new district. It does not seem to have been objected that, although the state had the power to appoint, control, and pay a state constabulary or police, it had no power to use the property of the old towns, cities, etc., for that purpose without compensation, although the opinion admits (p. 540) that, if the provisions of the statute had been limited territorially to the city of New York, it would have been in conflict with the section of the constitution cited.

The opinion states in effect, even if only indirectly (p. 556), that the police of New York is inefficient, that crime is rampant, and the arm of criminal law is paralyzed, although there was no allegation of any statement of this kind in the pleadings, the case being heard on demurrer to the answer. The opinion can only be sustained upon the assumption that a court may take judicial cognizance of such a state of things.

Admitting the power of the state legislature in case of necessity to create a system of state police for the repression of crime, following the precedent of the Act 10 Geo. IV. c. 44, creating a metropolitan police for London and its vicinity, a state act of this character should leave intact and untouched the local police of the towns and cities within the area of the new district. For the act cited, 10 Geo. IV. c. 44, was passed by Parliament, which, "with its powers of legislation unrestrained by written limitations, so far respected the immemorial municipal rights of the city of London, and the inherent love which the English people entertain for local administration, that it left the municipal police force of the city in existence and entirely untouched by the act."<sup>1</sup>

The plain statement of the facts connected with this case by Professor Goodnow (p. 20), in his *Municipal Home Rule*, shows

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<sup>1</sup> *People v. Draper*, pp. 570, 571, by Brown, J., in his dissenting opinion, the whole of which should be carefully read, especially as his conclusions have been adopted since then, as we shall see, by the New York Court of Appeals.

that the historical antecedents of New York are such as to warrant the conclusion that the case was wrongly decided, apart from the error made by the court in going outside of what was admitted by the demurrer.

"The city of New York received from the English kings during the colonial period a charter, which, on the declaration of the independence of the colony of New York and the establishment of the new state of New York, was confirmed by the first constitution of the state (Art. XXXVI.). For a considerable period after the adoption of this constitution, changes in that charter were made upon the initiation of the people of the city, which initiation took place through the medium of charter conventions, whose members were elected by the people of the city, and no statute which was passed by the legislature of the state, relative to the affairs of the city of New York, took effect within the city until it had been approved by the city. About the middle of the century, the legislature was called upon to interfere in the administration by the city of certain matters which affected the state as a whole. One of the most marked examples of this central interference, made without the consent or approval of the city or its people, is to be found in the adoption of the metropolitan police bill in 1857. The administration of the police in the period immediately preceding 1857 had been accompanied by great scandal, and was regarded as extremely inefficient. Partly because of this, and partly, it is believed, for reasons of partisan politics, the legislature provided for the formation of a metropolitan police district which embraced all the territory of certain outlying districts. On account of the unprecedented character of such an act, the people of New York, led by the mayor, attempted to resist the enforcement of the bill, and such resistance led to positive bloodshed. The question, however, was finally referred to the courts, and the Court of Appeals (*People v. Draper*, 15 N. Y. 532) held that the action of the legislature was perfectly proper, inasmuch as the administration of the police was not a local function, but was a matter which affected the state as a whole, and might therefore be put into the hands of authorities having jurisdiction over a territory greater than that of any one city, and appointed by the central government of the state. The success of the legislature in thus interfering in what had been considered by the people of New York a branch of municipal administration led it to carry its interference into other branches where its action could not be so well justified. In addition to centralizing in the same way the administration of the fire department and the administration of the public health and of excise legislation, *i. e.*, liquor legislation, the legislature provided for a commission to attend to the public parks, which were evidently a matter of purely local concern. It has, within recent years, appointed an aqueduct and a rapid transit commission, both bodies attending not to state but to muni-



cial business. The application of the principle thus established has been of great disadvantage to the government of the various cities within the state, and, as has been pointed out by the Hon. Seth Low in his chapter on Municipal Government in Bryce's *American Commonwealth*, 1st Am. ed., vol. i. p. 639, 'the habit of interference in city action has become to the legislature almost a second nature.'"

The case of *The People v. Draper* was followed by *The People v. Shepard*,<sup>1</sup> which involved the constitutionality of an act establishing a Capital Police District, embracing parts of Albany and Rensselaer counties, the city of Schenectady, and the lines of railroad between Albany and Schenectady.

Emboldened by success, the politicians next sought to extend the field of their peculiar operations by passing an act "to establish the Rensselaer Police District," to consist of the city of Troy and a contiguous strip, the principle supposed to have been established in *The People v. Draper* being relied upon as giving color to this act.<sup>2</sup>

The satirical statement in the opinion, last paragraph, page 67, shows that the court well understood the nature of the forces securing such legislation: "As the Capital Police District was an experiment, and, as it resulted, a successful experiment, upon the principles supposed to be established in *People v. Draper*, the act before us is an experiment, and in the direction of an encroachment upon the constitution, an improvement upon both acts, and marks the progressive spirit of the day."

Cooley also well understood the nature of these forces: —

"A remarkable case of evasion to avoid the purpose of the Constitution, and still keep within its terms, was considered in *People v. Albertson*, 55 N. Y. 50."<sup>3</sup>

The case of *People v. Draper* is criticised, distinguished, and regretted at pp. 63, 64, 65 of *People v. Albertson*; and the case of *People v. Shepard* is questioned at pp. 65, 66, 67, with strong approval given to Brown, J.'s, dissenting opinion in *People v. Shepard*, at page 64: —

"That decision has now stood so long judicially uncondemned, although never, I think, satisfactory to the public or the legal profession, that it might not be proper, under any circumstances, to review or overrule it; and it is to be hoped, in the interests of constitutional government

<sup>1</sup> 36 N. Y. 285 (1867).

<sup>2</sup> *The People v. Albertson*, 55 N. Y. 50 (1873).

<sup>3</sup> Cooley, *Const. Lims.* 207, note 1.

by the people, that the occasion to reaffirm its doctrines may never arise. To my mind, the dissenting opinion of Judge Brown, concurred in by Judge Comstock, presents unanswerable arguments why the decision should have been different."

That the cases of *People v. Draper* and *People v. Shepard* are considered as overruled at the present time in New York, sufficiently appears in *Rathbone v. Wirth*:<sup>1</sup>—

"But neither the *Draper* nor *Shepard* case, I think, can any longer be considered authority in this state, since the decision of the case of *People v. Albertson*."<sup>2</sup>

Upon appeal to the Court of Appeals, the judgment in the Supreme Court was affirmed.<sup>3</sup> The opinions given in both courts all deserve careful study. The result is that the doctrine laid down in *People v. Draper* has been successfully shaken, and is no longer the law in New York. It is no longer an authority.

It may be claimed that this is largely in consequence of Sec. 2, Art. X. of the constitution of New York, 1846, reenacted in the constitution adopted November 6, 1894, in force January 1, 1895. But it is submitted that this section is merely declaratory of what the law would be as to the powers of cities, towns, and villages to elect their own officers, even without this statement in the constitution, and therefore has no bearing on the matter at issue.

*Town of Duaneburg v. Jenkins*:<sup>4</sup> At page 189 in the opinion of the Commissioners of Appeals, by Johnson, C., will be found the statement: "A town is, as to the powers it shall possess and the functions it shall perform, the creature of the legislative will." But this statement is a mere *obiter dictum*, as it was not the issue then before the court. The case related to the validity of an act of the legislature declaring that where town railroad bonds have been issued by a town commissioner, and the railroad shall have been constructed through such town, the bonds shall be binding upon the town, without reference to the sufficiency of the proof that the town had duly authorized the issue of bonds. Clearly the town would be estopped from denying their obligation after standing by, allowing the railroad to be built, and reaping the benefits therefrom. The case is of no weight as an authority that the legislature has complete powers over towns, because no such broad principle was necessary to the decision of the case.

<sup>1</sup> 40 N. Y. Supp. 535 (1896), at pp. 545 and 546; 6 App. Div. N. Y. 277, s. c.

<sup>2</sup> 55 N. Y. 50, by Herrick J.    <sup>3</sup> 150 N. Y. 459 (1896).    <sup>4</sup> 57 N. Y. 117 (1874).



The Mayor, etc. *v.* The State, etc. :<sup>1</sup> It was held in this case that, the power of appointment to offices having been exercised by the legislature from the earliest period of the government, in the absence of any prohibition, express or implied, in the constitution, it is presumed the intention was that the legislature should continue to exercise that power, and therefore it could appoint the officers, the validity of whose appointment was in issue in this case.

Similarly, in those states where towns and cities managed their own local affairs and elected their own officers before there was a written constitution, in the absence of any prohibition, express or implied, in the constitution, it is to be presumed the intention of the people framing the constitution was that the towns and cities should continue to exercise the same powers. To this extent, therefore, this case supports the principles herein contended for.

That no *test* for election or appointment to office is allowable, see the same case, declaring unconstitutional a proviso "that no Black Republican, or endorser or approver of the Helper book," shall be appointed to office. We shall take up this subject later on.

In *Pumphrey v. Mayor, etc.*,<sup>2</sup> of Baltimore, the question as stated in the opinion (page 151) was whether the legislature had power to direct and require the city to take and maintain a certain bridge. This was a question similar to that raised in *State v. Williams*,<sup>3</sup> already considered. It may well be that the legislature has power to order highways and bridges to be built, and to apportion the cost thereof upon municipalities or other territorial divisions of the state already existing or created for that purpose, even although towns and cities may have a right to local self-government. The opinion says, with correctness (page 152): "Now if there were no bridge at that place, it would certainly be competent for the legislature to require the city to construct one; then what valid objection can there be to an act requiring the city to purchase one which is already constructed?"

Here the decision might have rested, and we should have no fault to find with it. But it also states that public corporations are created for political purposes; that they are instruments of the government subject to the control of the legislature, "and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises."

As a universal statement of American law, or even probably of

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<sup>1</sup> 15 Md. 376 (1859).

<sup>2</sup> 47 Md. 145 (1877).

<sup>3</sup> 68 Conn. 131.

the law in Maryland, we deny the correctness of such language; as to the case in which these sweeping statements were made, they were *obiter dicta*.

*State v. County Court of St. Louis*:<sup>1</sup> An act of the legislature authorized the Board of Police Commissioners of the city of St. Louis, whenever they shall need money to meet the expense of the police force, to make requisition upon the county of St. Louis for one fourth and upon the city of St. Louis for three fourths thereof. The act was resisted, upon the ground that to compel the county without its consent to contribute towards the support of the city police is in violation of common right and of the constitution of the state, in that it appropriates private property without just compensation; that it is retroactive in its operation; and that it violates the principles of taxation as laid down in the constitution. No objection was made upon the ground that the act is in violation of the right of towns and cities to local self-government nor was the subject alluded to in the opinion sustaining the validity of the act. The case is therefore not to the point. Whether towns and cities in Missouri have a right to local self-government would require an examination of its local history and political development which we cannot here enter into. Nor was such an examination gone into in this case.

*Booth v. Town of Woodbury*:<sup>2</sup> The real question in this case was whether a town has the power to appropriate money for gratuities to men drafted into the military service of the United States. The court decided that the towns of this state had not the power, and to this decision we bow. But to go further, as the court did, and to say that towns, like other corporations, can exercise no powers except such as are expressly granted to them, or such as are necessary to enable them to carry out the powers expressly granted to discharge their duties, is only *obiter dictum*, for this broad question was not before the court. So in the next case, *Webster v. Town of Harwinton*.<sup>3</sup>

The question was whether the towns of this state have power to appropriate money for bounties to be paid to men drafted into the military service of the United States, the same question that was raised in the last case.

The court decided they have no such power. It was unnecessary and therefore *obiter dictum* to go further, as the court did, and to say that the towns of Connecticut have no original power of

<sup>1</sup> 34 Mo. 546 (1864).

<sup>2</sup> 32 Conn. 138 (1864).

<sup>3</sup> *Ib.* 131 (1864).



legislation and taxation. This conclusion could only be got at after a thorough presentation of both sides of this question in a case in which it would be the real issue, and an examination of the documents, customs, laws, and the historical development of the state would be indispensable, and this was not done. The opinion loses greatly in force because of its unnecessary wholesale unjudicial condemnation and depreciation of the citation as authority of the work of historians and of their deductions (page 136), and the assertion that the views expressed by them are made without sufficient reflection or examination. This sweeping *obiter dictum* is made too merely as bald assertion, without bringing forward one single instance of incorrectness by the historians condemned, or any proof of the correctness of the position thus arrived at by the court. At page 137 the learned judge, delivering the opinion of the court, says: "But the inhabitants of the several plantations and towns obviously could not and did not constitute themselves corporations," . . . thus deciding as a question of law and of fact (or as a mixed question of law and fact) something which an examination shows was exactly what the towns did do. It is submitted, therefore, that not only was this declaration by the court *obiter dictum*; it was also incorrect. This finding by the court implies also that what the towns did do was not enough to constitute them corporations; whereas no argument was made as to what is necessary to make the inhabitants of a town a corporation.

State *v.* Williams: <sup>1</sup> We need not disagree with the main doctrine in this case, that the state can impose upon such territorial subdivision of the state as it may deem equitable the burden of constructing and maintaining highways and bridges as it may judge best for the public interests.

But on page 149 the opinion of the court by Baldwin, J., states: "Towns have no inherent rights: they have always been the mere creatures of the colony or state, with such functions and such only as were conceded or recognized by law," citing Webster *v.* Town of Harwinton, the case last considered, thus furnishing an illustration of the conversion of an *obiter dictum* into a recognized authority in a subsequent case. Yet the extract above cited is itself only *obiter dictum*, for towns may have inherent rights and yet the power of the state to create new territorial subdivisions of the state for certain purposes may not conflict or interfere with those town rights which are to be exercised within their own

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<sup>1</sup> 68 Conn. 131 (1896).

proper sphere only. As to the relation of towns to the state in Connecticut, it is submitted that no impartial inquirer can doubt what they are after reading the careful summary of the historical development thereof in the dissenting opinion of Andrews, C. J., in this case, pp. 157-177, Hamersly, J., concurring.

This case was carried to the Supreme Court of the United States, and will be found reported as *Williams v. Eggleston*,<sup>1</sup> It is sometimes but incorrectly cited as an authority to the effect that towns have no powers unless they are expressly or by necessary implication conferred upon them. What this court really decided was that there was nothing in this case that violated any of the provisions of the Constitution of the United States.

The statements in the opinion by Brewer, J., p. 310, "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of government, and as such it is subject to the control of the legislature," is *obiter dictum*, unless the statement be construed to mean that the United States has no supervisory power in the premises. This would seem to be what is meant by the additional statement: "These are matters of a purely local nature, in respect to which the federal Constitution does not limit the power of the states."

*Amasa M. Eaton.*

[To be continued.]

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<sup>1</sup> 170 U. S. 304 (1897).



CLASSIFICATION OF RIGHTS AND WRONGS.<sup>1</sup>

## II.

SOMETHING still remains to be said upon the subject of rights, but it will be convenient first to consider the wrongs by which rights may be infringed.<sup>2</sup> Such wrongs are divisible into two classes, namely, torts and breaches of obligation. A tort is disobedience to a command of the State, and is affirmative or negative, according as the command is negative or affirmative, the tort being in that respect the converse of the command. The State commands every person within its limits to do no act which will infringe an absolute right of any other person, *i. e.*, it prohibits all such acts. Moreover, such acts are the only ones which the State prohibits in the interest of private rights. It follows, therefore, that every infringement of an absolute right is an affirmative tort, and that every affirmative tort is an infringement of an absolute right.

It will be seen, therefore, that an infringement of an absolute right is equally an affirmative tort, whether the right itself be affirmative or negative; and the reason is that the infringement constitutes equally, in either case, an act of disobedience to a prohibitory command of the State. The only important difference between the two cases is that, in the case of an affirmative right, the right exists independently of the command, and the command is issued merely to protect the right, while, in the case of a negative right, the right has no existence until the command is issued, and it is the prohibitory command alone that both creates the right and makes the act of infringement tortious. This difference

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<sup>1</sup> Continued from page 556.

<sup>2</sup> The reader must not suppose that a person whose right has been infringed can sue the wrong-doer directly for the infringement; for that would be to punish him for his wrongful act, and he can be punished, if at all, by the State alone. All that the State regards the person wronged as entitled to is a compensation for the wrong, and such compensation it will compel the wrong-doer to make. For that purpose, however, a new right must be created, and, accordingly, the moment an obligation is broken or a tort committed, the law imposes upon the wrong-doer an obligation, in favor of the person wronged, to compensate him for the wrong, and it is upon this that the latter sues. Such rights are created solely for the sake of the remedy, and are, therefore, commonly called remedial rights. It is scarcely necessary to say that they do not come within the scope of this article.

between an affirmative and a negative right is attended with some important consequences,<sup>1</sup> but they do not relate to the nature of the act which will constitute an infringement of the right.

The State also commands every person within its limits to do every act which the State makes it his duty to do. Indeed, to command one to do a thing, and to make it his duty to do it, are one and the same thing, each necessarily implying the other. Moreover, as all duties are affirmative, all commands to do one's duty are also affirmative, and these are the only affirmative commands which the State issues. It follows, therefore, that, as every breach of duty is a negative tort, so every negative tort is a breach of duty.<sup>2</sup>

An impression seems always to have prevailed that a tort must necessarily be an affirmative act;<sup>3</sup> and the explanation of this seems to lie in the fact that duties and their true nature have received so little attention. Certainly, the impression appears to rest upon no more solid foundation, for no reason can be given for regarding disobedience to an affirmative command as any less tortious than disobedience to a negative command. At all events, there is no doubt whatever that every breach of duty is a tort. This is conclusively proved by the fact that the only action that will lie for a breach of duty is the Action on the Case;<sup>4</sup> and this again is not the least convincing proof of the correctness of the view heretofore stated as to the legal nature of a duty, and as to the radical difference between a duty and an obligation.<sup>5</sup> It also explains a phenomenon which has caused much difficulty to courts and lawyers, namely, that, in certain classes of actions, in which the defendant has committed no affirmative wrong, — for example, actions against common carriers, innkeepers, or professional persons, — the plaintiff often has an option between framing his action in contract and in tort. It also explains the fact that certain

<sup>1</sup> If these consequences had been attended to by the authors of the original copy-right Act (8 Anne, c. 19), and the Act had accordingly been so drawn as to revert in the authors of published books the affirmative right which they were supposed to have lost by publication, instead of a new negative right, *i. e.*, the exclusive right of multiplying copies, some serious evils would have been avoided. See *infra*, pp. 668-9.

<sup>2</sup> See *infra*, p. 678, note.

<sup>3</sup> Accordingly, an attempt has been made to give the breach of a duty the appearance of an affirmative tort by terming it a subtraction. Thus, Blackstone considers the breach of any duty which is imposed upon one person for the benefit of land belonging to another as a fifth species of injury to real property (the first four being ouster, trespass, nuisance, and waste), and he treats of such breaches in B. 3, c. 15, — which chapter is entitled, "Of Subtraction." So the canonists speak of the subtraction of tithes, of legacies, of conjugal rights, and of church rates.

<sup>4</sup> See *supra*, p. 543, n. 1.

<sup>5</sup> See *supra*, pp. 542-3.



classes of torts may be affirmative or negative, according as they consist of affirmative acts or of mere breaches of duty; for example, any tort committed by a tenant for life or for years as such, against the owner of the reversion, is termed waste; and this may consist either of affirmative acts which injure the reversion (*i. e.*, wilful or voluntary waste), or in a failure to perform the duty of keeping the property in as good a condition as it was in when it first came into the tenant's possession (*i. e.*, involuntary or permissive waste).

The infringement by an obligor of the right created by a personal obligation incurred by him is the only infringement of a right which does not constitute a tort, and hence it is distinguished from all others by being termed simply a breach of obligation. Hence also the remedy, for it is not (as for the infringement of all other rights) an action *ex delicto*, but an action *ex contractu*. This seems to prove conclusively that the State is not supposed to command the performance of obligations. It also proves the existence of the wide difference between obligations and duties which has been herein contended for.<sup>1</sup>

As torts are affirmative or negative, according as the commands which they infringe are negative or affirmative, the one being the converse of the other, so breaches of obligation are negative or affirmative, according as the obligation is affirmative or negative, the one being the converse of the other.

It remains to speak of the infringement of relative rights regarded as absolute rights. Such infringements always constitute affirmative torts;<sup>2</sup> but they chiefly occur in connection with real obligations. Indeed, as real obligations consist merely in authorizing something to be done, the doing of which the obligor (being an inanimate thing) has no power to prevent or even obstruct, it may be correctly said that a real obligation is incapable of being broken; and, therefore, every infringement of the right created by a real obligation, whether it be by the owner of the *res*, which is subject to the obligation, or by a stranger to the obligation, is necessarily an affirmative tort.

It has been seen that, in the case of personal obligations and duties, the infringement of the right is precisely the converse of the right itself, and, therefore, if one knows what the right is, he will necessarily know what will be an infringement of it; and, if one knows what will be an infringement of the right, he will also

<sup>1</sup> See *supra*, pp. 542-3.

<sup>2</sup> See *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. D. 333.

know what the right itself is. An infringement is not necessarily, indeed, coëxtensive with the right, but, so far as the infringement goes, the correspondence between it and the right is perfect. In the case of absolute rights, however, *i. e.*, in all cases in which the infringement of the right is an affirmative tort,<sup>1</sup> the correspondence is not between the right and its infringement, but between the latter and a prohibitory command issued by the State for the protection of the right. While, therefore, the fact that an affirmative tort has been committed is sure proof that the act which constituted it had been prohibited, and also that the right which it infringed was neither an obligation of the person committing the act, nor a duty imposed upon him, it does not necessarily furnish any further proof as to the nature or extent of the right infringed. Nor will the most perfect knowledge of the nature and extent of a right, any infringement of which will be an affirmative tort, necessarily enable one to say what acts will, and what will not, constitute an infringement of the right. It follows, therefore, that, in order to determine, in a given case, whether an affirmative tort has or has not been committed, it may be necessary, first, to identify the right which has been infringed (if there have been an infringement), and to ascertain its legal nature and extent, and, secondly, to ascertain whether the act which has been committed is an infringement of that right; and the accomplishment of the first of these objects may afford no material aid in accomplishing the second.

There is also another reason why an affirmative tort is apt to involve greater legal difficulty than a negative tort or a breach of obligation, namely, that it is more difficult to identify the right infringed, and ascertain its legal nature and extent. Obligations and duties are all of human creation, and it is the business of those who create them to mark out their extent; and, if they neglect to do so, they are liable to be visited with the consequences of their negligence. Hence it seldom happens, when an obligation or duty is admitted to exist, that any question arises as to its extent; and it is scarcely possible in the nature of things that any question should arise as to its identity. Persons and other corporeal things, on the other hand, exist in nature, and the rights to which they give rise have always and everywhere existed, and the State has seldom done more than passively recognize their existence. As to personal rights, the State does not, as has been seen,<sup>2</sup> attempt to enumerate, define, or limit them, nor even to ascertain their exist-

<sup>1</sup> There is, however, one exception to this. See *infra*, p. 668.

<sup>2</sup> See *supra*, p. 538.



ence further than is from time to time found necessary for the purpose of protecting them. As to corporeal things, other than human beings, the State recognizes individual ownership of them, and, as to movable things, this seems to be all that is necessary; but individual ownership of land implies a division of it among its different owners, and accordingly the State recognizes any division which the owners may make, and, if they cannot agree upon a division, the State itself makes the division; and thus the lateral extent of each person's ownership may be definitely ascertained. But it is also necessary to ascertain how far the individual ownership of land extends vertically, and, as to that, the State has established the rule that it extends downwards to the centre of the earth, and upwards to the heavens (*usque ad cælum*),<sup>1</sup> and also that this is presumptively the vertical extent of the ownership of every person who owns the surface of a given piece of land, though the contrary may be proved. The State also permits an owner of land, as such, as we have seen, to acquire rights in the land of his neighbor, — which rights the State declares to be accessory, appendant, or appurtenant to his ownership of his own land, and which are known in our law as easements and profits.

Perhaps the reader will think there is nothing in the foregoing to cause any uncertainty or confusion in regard to rights of property in land, and perhaps also he will be right in so thinking. Unfortunately, however, uncertainty and confusion do exist upon this subject, whatever may be their cause, and it is hoped that the following observations will have a tendency to lessen them.

First. Ownership of Blackacre (for example) constitutes only a single legal right. It may be said, indeed, that such ownership gives to the person in whom it is vested a right to do a great variety of things, but that only means that it enables him to do them without committing a tort, and that it renders tortious any act which prevents his doing them, or obstructs him in doing them; and it is by virtue of the one right of ownership that any act done by the owner of Blackacre is rightful, which without such ownership would be tortious; and it is the same one right that is infringed by any act which is a tort to the owner of Blackacre as such, and which, in the absence of such ownership, would be rightful as against him.

Secondly. If, therefore, the owner of Blackacre has two or more rights, which are liable to affect the legal relations between him

<sup>1</sup> See *supra*, p. 539.

as the owner of Blackacre and the owner of Whiteacre, which adjoins Blackacre, it is because he has one or more rights in Whiteacre, — which rights are appendant or appurtenant to such ownership. Moreover, such rights must have been acquired either by the present owner of Blackacre, or by some preceding owner, and they can have been acquired only in two ways, namely, either by grant from a person who had the power to create the right, *i. e.*, from the owner of Whiteacre, or by prescription, *i. e.*, by enjoyment so long continued as to be in law equivalent to a grant.

It follows, therefore, that the so-called right of support from adjoining land, whether for land or for buildings, has no existence as a right separate and distinct from the ownership of the land or buildings to be supported, unless it be a right in the land which is to give the support, and that such a right can exist only by a grant from the owner of such land or by prescription. It also follows that the so-called right of support for land from adjoining land, whether the support be lateral or vertical, has no existence as a right in the land which is to give the support, as it is admitted that such right, if it exists at all, exists independently of either grant from the owner of such land or of prescription. It also seems to follow that the so-called right to support from adjoining land for buildings, whether the support be lateral or vertical, cannot exist, except as a right in the land which is to give the support, and that, as such a right, it cannot exist by prescription, unless the support enjoyed be such as would have enabled the owner of the land giving the support, prior to the acquisition of the right, to maintain an action for an affirmative tort, and that is something which practically never happens.

It also follows that there is no such thing as the ownership of a stream of water which flows over one's land, or of that part of it which flows over one's land, separate from the ownership of the land of which it forms a part, though there may be a right in the land of one's neighbor, in respect of such stream, and such right may consist (for example) either in a right to prevent the natural flow of the stream from the land above to one's own land, or in a right to prevent its regular and natural flow from one's own land to the land below.<sup>1</sup>

While, however, the ownership of Blackacre constitutes only one legal right, yet that right may be infringed in many ways. It has just been seen, for example, that such ownership enables the person

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<sup>1</sup> *Wright v. Howard*, 1 Sim. & Stu. 190; *Mason v. Hill*, 3 B. & Ad. 304, 5 Id. 1.



in whom it is vested to do a variety of acts, and it may now be added that the State forbids any other person either to do any of those acts, or to obstruct the owner in doing any of them, and any disobedience of this command will, of course, be an affirmative tort committed against the owner of Blackacre as such. Suppose, then, A and B are adjoining owners of land, and A makes an excavation in his land, and thereby causes the soil of B to fall into the excavation. Does A thereby infringe B's right of ownership? It is clear, both upon principle and authority,<sup>1</sup> that he does. What is the nature of the tort which he commits? Clearly, it is trespass *quare clausum fregit*; for, though he does not personally enter B's close, yet the physical effect of his act extends into it, and thus produces important consequences. Suppose A, by means of artificial support, prevents B's soil from falling into the excavation? Then A commits no tort; and this proves, if proof be needed, that B has no right in A's land. Suppose the excavation produces no effect upon B's land for two years, but at the end of two years B's soil falls into the excavation? It is settled by the highest authority<sup>2</sup> that the whole tort is committed at the latter date, and consequently that the Statute of Limitations then first begins to run in favor of A; and this proves that the tort consists, not in making the excavation, but in causing B's soil to fall into it, and consequently that the right infringed is B's ownership of his own land, and not any right of his in A's land.

Suppose the surface of certain land belongs to A, while all the minerals under the surface belong to B, or that the upper part of a house belongs to A, while the lower part belongs to B, and B so conducts his mining as to cause A's soil to sink, or so conducts the repairs of his part of the house as to cause A's part to fall? It must be regarded as settled by authority<sup>3</sup> that B will be liable to A in either case; and yet it is assumed that A has acquired no right in B's part of the land, nor in his part of the house, whether by reservation, grant, or prescription; and, therefore, it must follow

<sup>1</sup> Gale on Easements, Part 3, c. 4, s. 1, of the 6th and 7th eds., and Part 1, c. 6, s. 4, subs. 1, of the previous eds.

<sup>2</sup> *Bonomi v. Backhouse*, E. B. & E. 622, 646, 9 H. L. Cas. 503. The decision of this case in the Queen's Bench was in the defendant's favor, Wightman, J., dissenting; but, on error to the Exchequer Chamber, the judgment was unanimously reversed. On error to the House of Lords, the judges were summoned, and they delivered their unanimous opinion in favor of affirming the judgment of the Exchequer Chamber, and for the reasons given by that court. The House itself also took the same view, and, therefore, the judgment was unanimously affirmed.

<sup>3</sup> *Humphries v. Brogden*, 12 Q. B. 739, and see *Rowbotham v. Wilson*, 8 H. L. Cas. 348.

that the causing of the surface of the land to sink, or of the upper part of the house to fall, is a tort to A's right of ownership. It seems also to be so upon principle; for, if the State is to permit so artificial and inconvenient a division of land or houses to be made between different owners, it must, in all reason, afford some protection to one who owns the surface only of land, or the upper part only of a house; and, therefore, the State is supposed to forbid the owner of the minerals, in the first case, to do anything which shall cause the surface of the land to sink, and to forbid the owner of the lower part of the house, in the second case, to do anything which shall cause the upper part to fall. It seems also that the State is supposed to impose upon the owner of the lower part of the house the duty of keeping it in such a state of repair that it will afford a sufficient support for the upper part.

Suppose A and B are adjoining owners of land, and B builds a house on his land extending to the boundary line between B and A, and then A makes an excavation in his land, but leaves a space between the excavation and the boundary line which would have been sufficient to prevent B's soil in its natural state from falling, but which proves insufficient to support the land with the house on it, and consequently the house falls? It is generally admitted<sup>1</sup> that A is not to be regarded as having caused B's house to fall, and so has not infringed B's right of ownership, and, therefore, that he is not liable to B, unless the latter has acquired by prescription or grant a right in the land of A to have his house supported by it; and it seems to be clear upon principle that no such right can be acquired by prescription, unless it can be shown that the pressure of the house, prior to the acquisition of the right, caused such a disturbance of A's soil as to render B liable in trespass; but this cannot be asserted upon authority.<sup>2</sup>

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<sup>1</sup> However, in *Angus v. Dalton*, 6 A. C. 740, 804, Lord Penzance said: "If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbor's house to the ground."

<sup>2</sup> *Angus v. Dalton*, 3 Q. B. D. 85, 4 Id. 162, 6 A. C. 740. In this case, it was finally held that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and that it is so acquired if the enjoyment is peaceable, and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. There was, however, much diversity in the views expressed by the judges, and still more in the reasons by which they supported them. In the Queen's Bench Division, one judge was for the plaintiff and two for the defendant; in the Court of Appeal, two for the plaintiff and one



If the owner of Blackacre have rights in Whiteacre, which adjoins Blackacre, and the owner of Whiteacre commit an affirmative tort against the owner of Blackacre, how shall it be ascertained whether the right infringed is the ownership of Blackacre, or some right which such owner has in Whiteacre? By ascertaining whether the tort was committed on Blackacre or on Whiteacre; and this depends, not upon where the act which constitutes the tort was done, but where it produced its tortious effect. Thus, if the tort consist in making soap on Whiteacre, or in manufacturing thereon bones into a fertilizer, or in burning bricks thereon, or in fouling the water of a stream which flows through Whiteacre, and thence into Blackacre, and sending it into Blackacre in its foul condition, or in making a dam in a stream which flows from Blackacre into Whiteacre, and thereby flooding Blackacre, — in each of these cases, it is plain that, while the tortious act is committed on Whiteacre, yet its tortious effect is produced wholly on Blackacre, and hence the right infringed is the ownership of Blackacre. On the other hand, if the tort consist in erecting a house on Whiteacre by which the access of light and air to ancient windows on Blackacre is obstructed, or in obstructing a way which the owner of Blackacre has over Whiteacre, it is plain that the tortious effect of the wrongful act is produced on Whiteacre; and, therefore, the right infringed is the easement of light and air in the first case, and the right of way in the second case.<sup>1</sup> In the second case, also, the owner of Whiteacre, if he wishes to contest the right claimed by the owner of Blackacre, may, instead of obstructing the way, sue the owner of Blackacre for trespass *quare clausum fregit*; and then the owner of Blackacre will have to set up as a defence the right of way which he claims. In case of some easements, moreover, this is the only course open to the owner of Blackacre. Thus, in the case just put

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for the defendant. And, though the judges who delivered opinions in the House of Lords agreed substantially in their conclusions, yet they differed greatly in their reasons, and one of them (Lord Justice Fry), while holding himself bound by the authorities to declare his opinion in favor of the plaintiff, yet also declared the rule, which he conceived to be established by those authorities, to be absurd and irrational, and one member of the House (Lord Penzance) entirely agreed with him. These circumstances do not, indeed, derogate from the authority of the decision within the United Kingdom, but elsewhere it is conceived that they ought to affect its authority very materially.

<sup>1</sup> These distinctions were lost sight of by Sir L. Shadwell, V. C., in delivering his judgment in *Sutton v. Lord Montfort*, 4 Sim. 559, 564; for while the case before him was one of obstructing an easement of light, and while the question he was considering was one which could arise only in cases in which the right infringed was an easement or other incorporeal right, yet he referred to the case of the owner of Whiteacre committing a nuisance against Blackacre, by making soap or grinding bones, as in point.

of fouling the water of a stream, as well as in that of erecting a dam across a stream in Whiteacre, and thereby flooding Blackacre, the owner of Blackacre has no means of preventing the act which he claims to be wrongful, and, therefore, if he wishes to contest the right of the owner of Whiteacre to do as he has done, the only course open to him is to sue the latter, and thus compel him to set up as a defence the right which he claims.

The ownership of incorporeal things differs, in respect to its infringement, from that of corporeal things, for the former can be infringed only by interfering with the owner's enjoyment of the thing owned; and, therefore, in order to ascertain in how many and what ways such a right can be infringed, one must ascertain in how many and what ways it can be enjoyed. The common law right of an author in his literary creations furnishes a good illustration of this. An ordinary literary composition can be enjoyed by its author to his profit in only one way, namely, by printing and selling copies of it; and, therefore, it is only by multiplying copies of it without the author's leave that his right can be infringed. The author of a dramatic composition may, however, enjoy it to his profit in another way, namely, by producing it on the stage, and, therefore, his right may be infringed either by multiplying copies of his composition, or by producing it on the stage, without his leave.

There is, moreover, one species of incorporeal ownership which is like a relative right in this respect, that it can be infringed in one way only, and that its infringement is precisely the converse of the right itself, namely, a monopoly or exclusive right granted by the State, *i. e.*, a negative absolute right; for, as such a right consists merely in the power to prevent any one else from doing what the grantee of the monopoly has the exclusive right to do, it is only by doing something to which the monopoly extends that the right of such grantee can be infringed. In this respect, therefore, a monopoly is strictly analogous to a negative personal obligation. By incurring a negative obligation, the obligor deprives himself of the right to do something as between himself and the obligee; by granting a monopoly the State deprives all persons within its limits, except the grantee of the monopoly, of the right to do something as between them and such grantee. For example, a copyright is simply a monopoly of the right of multiplying copies of a printed book; and, therefore, it is no infringement of an author's copyright in a published drama to produce such drama on the stage. It follows, therefore, that a copyright in a published drama is by no means equal, even while it lasts, to an author's common law



right in an unpublished drama. Of course, the State might have revested in the authors of published books, for a limited period, the right which it declared them to have lost by publication, and the title<sup>1</sup> of the original copyright act<sup>2</sup> indicates that the legislature which passed it supposed that that was what it was doing; but all that the act really did was to vest in authors of published books the exclusive right of multiplying copies of them;<sup>3</sup> and a consequence was that, for more than a century,<sup>4</sup> the publication of a drama deprived its author of all exclusive right of producing it on the stage. Another consequence was, that it required two statutes, and the creation of two rights, to replace, for a limited period, the one common law right which the author of a drama was held to have lost by publishing the drama. It may be further remarked that the two statutory rights are inferior to the one common law right, not only because of their limited duration, but also because they do not extend beyond the limits of the State which creates them, while the common law right is good everywhere.

There are some affirmative torts which are clearly infringements of rights of property, but which consist, not in injuring anything which belongs to another, but in wrongfully depriving another of something which belongs to him, or in wrongfully intercepting something which would otherwise come to another, and yet under such circumstances that the person injured cannot be restored to what he has thus been wrongfully deprived of, and, therefore, he must content himself with a compensation in money, *i. e.*, damages. In such cases, therefore, while the tort is clearly to property, yet it is not a tort to any particular thing, nor has it properly any relation to any particular thing. It is, therefore, a tort to the estate of the person injured in the aggregate, — to the *universitas* of his estate (as the Romans called it), consisting, as it does, in making him so much poorer. Of this description are many species of fraud, for example, the so-called infringement of a trade-mark, or of good-will, — which consists in wrongfully and fraudulently depriving another person of customers whose patronage he would otherwise have received.

In all such cases, it is very important that it be clearly under-

<sup>1</sup> "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."

<sup>2</sup> 8 Anne, c. 19 (1709).

<sup>3</sup> "Shall have the sole right and liberty of printing such book and books for the term of," etc. S. 1.

<sup>4</sup> Namely, in England, until 1833, when 3 & 4 Will. IV. c. 15, was passed; in the United States, until the passage of the Act of 1856, c. 169. 11 Stats. 138.

stood that the tort is not to any specific thing; for, otherwise, one will be in danger of deceiving himself as to the nature of the right injured, — of persuading himself, indeed, that the injury is to a right which in truth has no existence. Thus, in cases of infringement of trade-mark or good-will, it has often happened that, as it was assumed that some specific thing must be injured, so it was concluded that a trade-mark or good-will is a species of incorporeal property, — a notion which clearly has no solid foundation. There may, indeed, be other reasons for the notion than the one just stated. For example, it has been found convenient to apply to trade-marks the nomenclature which had become familiar in connection with patent rights and copyrights, and the practice of doing so has suggested and made plausible the idea that the former were analogous to the two latter. So, also, trade-marks and good-will have often been spoken of and treated as proper subjects of purchase and sale. It is, however, only by a figure of speech that either of these can be said to be purchased or sold, and what is called a purchase and sale of a trade-mark or good-will is in truth only a contract, by which (for example) the so-called seller agrees to retire from business, and to introduce the so-called purchaser to his former customers and to the public as his successor.

What has thus far been said of rights and their infringement has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a thing, which by law has no owner, is a subject of ownership, nor that a thing belongs to A which by law belongs to B; nor can it create an obligation or impose a duty which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law.

If there is no element of equity in a given right, neither is there any in the infringement of that right; for what is an infringement of a right depends entirely upon the extent of the right. If, therefore, equity could declare that a right has been infringed when by law it has not, it would thus enlarge the right of one man, and curtail that of another.

When, however, it is said that equity has no voice in a given question, it must not be inferred that a judge sitting in equity has



no such voice. An equity judge administers the same system of law that a common law judge does; and he is therefore constantly called upon to decide legal questions. It, accordingly, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right which courts of common law refuse to recognize; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as an infringement of a legal right, which courts of common law treat as rightful; but it does not follow that such an act is properly an equitable tort. A well-known instance of such an act is found in what is commonly called equitable waste. For example, if a tenant for life, without impeachment of waste, cut down ornamental trees, or pull down houses, a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be; for the question depends entirely upon the legal effect to be given to the words, "without impeachment of waste," and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of views is, that there is a remedy in equity against the tenant in the case supposed, while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct.

As legal rights have in them no element of equity, so equitable rights have in them no element of law. In short, legal rights and equitable rights are entirely separate and distinct from each other, each having a source and origin of its own, — legal rights being the creatures of the law, *i. e.*, of the State, and equitable rights being the creatures of equity. What then is the nature of equitable rights, and how can equitable rights and legal rights coëxist in the same State? This question suggests another, namely, what is the nature of equity, and how can law and equity coëxist in the same State? As law is the creature of the State, so equity was originally the creature of the supreme executive of the State, *i. e.*, of the king. What then was the power of the king which enabled him to create equity? It may be answered that he had in him the sole judicial authority, as well as the sole executive power, but none of the legislative power (*i. e.*, he could not alone exercise any portion of the latter). By virtue of his judicial

power, he had entire control over procedure, so long as the legislature did not interfere; and this it was that enabled him to create equity. As he had no legislative power, he could not impart to his decisions in equity any legal effect or operation, but when he had, by the exercise of his judicial authority, rendered a decision in equity in favor of a plaintiff, he could enforce it by exerting his executive power against the person of the defendant, *i. e.*, he could compel the defendant to do, or to refrain from doing, whatever he had by his decision directed him to do or to refrain from doing.

The subject must, however, be examined a little more closely. The cases in which equity assumes jurisdiction over controversies between litigants may be divided into two great classes, namely, those in which a plaintiff seeks relief in equity respecting some legal claim which he makes against the defendant, and those in which he makes no such claim. In the first class of cases, the ground upon which equity takes jurisdiction is that the plaintiff either can obtain no relief at all at law, or none which is adequate; and, therefore, so far as regards this class of cases, equity consists merely in a different mode of giving relief from that employed by courts of common law, *i. e.*, in a different mode of protecting and enforcing legal rights; and, therefore, the exercise of this branch of the jurisdiction has already been sufficiently accounted for.

The other class of cases, however, is not so easily disposed of. It may be divided into those in which the plaintiff sets up no legal right whatever, and those in which the only legal right he sets up is a defence to some legal claim which the defendant makes against him. In cases belonging to the first subdivision, equity interferes upon the ground that the substantive law (and not merely the remedial law) is inadequate to the purposes of justice. In cases belonging to the second subdivision, equity interferes upon the ground that justice requires that the plaintiff should be permitted to take the initiative in the litigation, and procure a decision of the controversy in a suit brought by himself, instead of being compelled to wait the pleasure of the defendant in suing him at law, and then to set up his defence. In one important particular, however, cases belonging to these two subdivisions are alike, namely, in the necessity which they impose upon equity of creating a new right in the plaintiff's favor; for no action or suit can be maintained in any court without some right upon which to found it. Moreover, such right must consist of a claim to be enforced against the defendant, and not merely of the means of defeating a claim which the defendant makes against the plaintiff, *i. e.*, of a defence.



How then is the difficulty to be met? In early times, probably, the difficulty itself was not much felt. Perhaps, indeed, it was not felt at all, it not being perceived that the king could properly issue judicial commands only in support of some right. At the present day, however, the question whether any given action or suit will lie must be answered in one of three ways, namely, first, by showing some right in the plaintiff on which the suit can rest; secondly, by saying that it will not lie; or, thirdly, by saying it is an anomaly; and the cases in which the plaintiff asserts no legal claim against the defendant are too numerous to be disposed of in that way.

Can equity then create such rights as it finds to be necessary for the purposes of justice? As equity wields only physical power, it seems to be impossible that it should actually create anything. It seems, moreover, to be impossible that there should be any other actual rights than such as are created by the State, *i. e.*, legal rights. So, too, if equity could create actual rights, the existence of rights so created would have to be recognized by every court of justice within the State; and yet no other court than a court of equity will admit the existence of any right created by equity. It seems, therefore, that equitable rights exist only in contemplation of equity, *i. e.*, that they are a fiction invented by equity for the promotion of justice. Still, as in contemplation of equity such rights do exist, equity must reason upon them and deal with them as if they had an actual existence.

Shutting our eyes then to the fact that equitable rights are a fiction, and assuming them to have an actual existence, what is their nature, what their extent, and what is the field which they occupy? 1. They must not violate the law. 2. They must follow the analogy of one or more classes of legal rights. 3. There is no exclusive field for them to occupy; for the entire field is occupied by legal rights. Legal and equitable rights must, therefore, exist side by side, and the latter cannot interfere with, or in any manner affect, the former. 4. They must be such as can be enforced by the exercise of physical power *in personam*; for, as equity has no other means of enforcing rights, it would be in vain for it to create rights which could not be so enforced. 5. Propositions one and four prove that no equitable rights can be created, even by way of fiction, in analogy to either class of absolute rights, nor in analogy to real obligations; and, though expressions are often met with which seem to indicate the contrary, yet they must be regarded as mere figures of speech. 6. All equitable rights

must, therefore, be in the nature either of personal obligations or of duties. 7. Equitable rights clearly constitute but one class, and, therefore, they must all be classed either as personal obligations or as duties. 8. They bear some analogy to duties but more to personal obligations; and, therefore, they must be classed as equitable personal obligations. They are analogous to duties in this respect, namely, that, as duties will be imposed whenever the State sees fit to impose them, so equitable rights will be created, subject to the limitations herein-before and herein-after stated, whenever equity finds it necessary to create them. In all other respects, however, they are analogous to personal obligations. 9. There is no division of equitable obligations answering to the division of legal obligations into those which are *ex contractu* and those which are *ex lege*; for a contract always produces a legal obligation. Therefore, all equitable obligations may be said to be *ex aequitate*. 10. An equitable obligation cannot impose a general personal liability upon the obligor, as that would be in violation of law. Therefore, while a covenant by a purchaser of land with his vendor, that no building shall ever be erected on the land other than a dwelling-house, will bind in equity all subsequent owners of the land until it comes into the hands of a purchaser for value and without notice of the covenant, yet a covenant by such purchaser with his vendor, that a dwelling-house shall be erected on the land, within a specified time, at a cost of \$10,000, will bind no one in equity whom it will not bind at law.<sup>1</sup> 11. An equitable obligation, therefore, can bind the obligor only in respect of some right vested in him; and, therefore, every right created by an equitable obligation is derived from, and dependent upon, some other right vested in the obligor. Moreover, every original equitable right is derived from, and dependent upon, a *legal* right vested in the obligor. In short, every equitable right is derived, either mediately or immediately, from a legal right; and, while an indefinite number of equitable rights may be derived from one legal right, yet they will all be dependent upon that one legal right.

It is not, however, all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the

<sup>1</sup> *Tulk v. Moxhay*, 2 Ph. 774; *Haywood v. Brunswick Building Soc.*, 8 Q. B. D. 403; *L. & S. W. R. Co. v. Gomm*, 20 Ch. D. 562, 582, 586, 587; *Austerberry v. Oldham*, 29 Ch. D. 750.



subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations are inseparably annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

If a legal right is capable of being the subject of an equitable obligation, the power of equity to impose an obligation upon the owner of it as such is subject to one limitation only, namely, that which is imposed by law. Under what circumstances, then, can an equitable obligation be imposed upon the owner of a legal right as such without violating the law? Whenever the owner of the right has received it by way of gift, but not for his own benefit, or has obtained it by fraud or other wrong, or has received it by way of gift, or without payment of value, from one who was himself bound by an equitable obligation respecting it, or has received it for value from a person so bound, but with notice that the latter was so bound. So, also, if the owner of a legal right incur a legal obligation respecting it, equity can, subject to the qualification stated in proposition ten, enforce that obligation against all subsequent owners of the right, until the latter reaches the hands of a purchaser for value and without notice. So, also, if the owner of a right has incurred a legal obligation to transfer it to another, and everything has been done, and all things have happened, necessary to transfer the right, if it were equitable, equity will treat the right as having passed in equity, though not at law, and, therefore, will impose upon its owner an obligation to hold it for the benefit of the legal obligee.

By an unfortunate anomaly it is also now held that the owner of a legal right may, by a mere declaration in writing to that effect, incur an equitable obligation respecting that right in favor of a person between whom and himself there has been no previous relation, and from whom he receives no consideration.<sup>1</sup> This is as much in violation of law as the case mentioned in proposition ten. Moreover, it is in effect enforcing an agreement which has no consideration to support it.

If A convey land to B, and the conveyance be expressed to be in consideration of money paid by B to A, but in fact the money was

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<sup>1</sup> Lewin on Trusts (10th ed.), 63.

paid as a loan, and not as the price of the land, the inference will be irresistible that the conveyance was made merely to secure the repayment of the money lent; and, therefore, the moment the conveyance is made, B will incur an equitable obligation to hold the land for A's benefit, subject to his own rights as A's creditor, *i. e.*, there will be a resulting trust in favor of the debtor.

If land be conveyed by a debtor to his creditor upon a condition subsequent, namely, that the title conveyed shall revest in the debtor on his paying the debt on a day named, or upon an agreement by the debtor to reconvey the land on payment of the debt on a day named, and the day be permitted to pass without payment, equity will, the moment that the debtor's legal right is thus lost, impose an obligation upon the creditor to reconvey the land upon being paid "principal, interest, and costs"; and this obligation will continue in force till equity itself puts an end to it. The principle upon which equity does this is that the debtor has lost his legal right as a penalty for not paying the debt on the day named, that the debt still remains unpaid, and, therefore, if equity does not interfere, the debtor, having lost his land, will also be compelled to pay the debt, if he have the means of doing so, — in which event he will receive nothing for his land. It may be objected that equity here violates the legal rights of the creditor by converting a penalty, agreed upon between the parties, into a mere security for the payment of a debt; but the answer is that the objection comes too late, for equity has in this manner relieved against all penalties from the earliest times, and its action in that respect has been acquiesced in by the legislature. For example, by the common law the obligor in a bond, who failed to pay on the day named in the bond, became in consequence liable to pay twice the amount of the original debt, but equity would always restrain an action to recover the penalty on payment of "principal, interest, and costs"; and the interference of equity in this way was not only acquiesced in, but its view was adopted by the legislature, and became statute law, more than two hundred years ago.<sup>1</sup>

If payment of a debt be secured by a pledge of the debtor's property, and also by the obligation of a personal surety, and the surety pay the debt, equity will compel the creditor to deliver the pledge to him, and not to the debtor, though the latter has a clear legal right to receive it, the debt being paid and extinguished; *i. e.*, equity destroys the legal right of the debtor, and converts the

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<sup>1</sup> Namely, by 8 & 9 Will. III. c. 11, s. 8.



creditor into a trustee for the surety. This is done upon the theory that the debt is not paid by the surety, but is purchased by him, and that he is, therefore, entitled to the pledge as an incident of the debt. This, however, is only a fiction, — a fiction, moreover, which is contrary to law; for the payment by the surety extinguishes the debt. Equity does this under the name of subrogation, and perhaps her best justification is that she borrowed both the name and the thing from the civil law. Equity has, moreover, followed the civil law in carrying the doctrine of subrogation still further; for it permits a surety who has paid the creditor, and thus extinguished the debt, to recover a full indemnity from the debtor, and that too on the theory that the debt still remains due from the latter, and that the surety is enforcing the rights of the creditor.

In all the foregoing cases the obligation imposed by equity upon the owner of a legal right is affirmative, *i. e.*, it is an obligation to hold the legal right for the benefit of the equitable obligee, in whole or in part. There are cases, however, in which the object of equity is not to compel the owner of a legal right to hold the same for the benefit of another, but to restrain him from exercising it for his own benefit; and, whenever that is the case, the obligation imposed will of course be negative. Thus, if a debtor fraudulently procure from his creditor a release of the debt, or procure such release for a consideration which he afterwards refuses or fails to pay or perform, equity will impose upon him an obligation not to use the release as a defence to an action or suit by the creditor to recover the debt. So equity will impose upon a defendant to an action or suit an obligation not to use a defence which will prevent a trial of the case upon its merits, or by which the course of justice will otherwise be obstructed. So, if a legal claim be of such a nature that it may be the subject of an indefinite number of actions, and if it has already been litigated sufficiently to satisfy the purposes of justice, equity will impose upon the unsuccessful party an obligation not to prosecute the claim further, or not to resist it further, as the case may be.<sup>1</sup>

When an equitable right has once been created, it may in its turn become the subject of a new equitable right, *i. e.*, its owner may incur an equitable obligation in respect to it, just as the owner

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<sup>1</sup> The rights mentioned in the text, namely, the right to bring an action, and the right to defend one's self against an action, seem to be personal rights. If they are not, they relate to procedure, and hence do not come within the scope of this article. See Holland, *Jurisprudence*, Part 2, c. 15.

of a legal right may incur an equitable obligation in respect to that; and this process may go on indefinitely, each new equitable right becoming in its turn the subject of still another equitable right, and all the equitable rights being derived from the same legal right, the first immediately, the others mediately.

If equitable rights are to be classed as obligations rather than as duties, it will follow that infringements of such rights are to be regarded as breaches of obligation. Perhaps, however, it is not very material whether they be regarded as breaches of obligation or as equitable torts; for, whether they be the one or the other, it seems that the relief which equity will give will be the same. For equity never gives damages for an infringement of an equitable right, but makes the wrong-doer a debtor to the person wronged instead, and proceeds upon the theory of compelling the former to restore to the latter what he has lost, or to place him in the situation in which he would have been if the wrong had not been committed.

C. C. Langdell.

NOTE.

At page 660, the writer inadvertently omitted to say that, as the infringement of a private duty is a negative tort, so the infringement of a public duty is a negative crime; and that, as the former is redressed by means of an action of tort, so the latter is punished by means of an indictment. See *Couch v. Steel*, cited *ante*, p. 543, n. 1.



# HARVARD LAW REVIEW.

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Published monthly, during the Academic Year, by Harvard Law Students.

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SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

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THE DEFENCE OF FRAUD TO A FOREIGN JUDGMENT. — In the conflict of laws we have a department of law as yet undetermined; hence every decision must be tested with much care by accepted first principles. As regards the effect of a foreign judgment, it seems formerly to have been the law that it was *prima facie* evidence merely in a domestic forum; as, upon that theory, the whole case might be reexamined, various defences as to the merits might be interposed. *Hilton v. Guyot*, 159 U. S. 113. However, it is now recognized that by the judgment of a foreign court of due jurisdiction new rights are created; and such foreign acquired rights are by a fundamental principle enforced in the domestic forum upon equal terms with rights acquired at home. *Goddard v. Gray*, L. R. 6 Q. B. 139. Accordingly, only such defences should now be allowed in a suit upon a foreign judgment as in a suit upon a domestic judgment. This rule is undoubted as an interstate question in the United States because of the constitutional provision, — see *Hanley v. Donoghue*, 116 U. S. 1, 4, — and should be the true rule as an international question. The one exception repeated in many *dicta* is that fraud is a defence to a foreign judgment. *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; *Hilton v. Guyot*, *supra*. In a late case this is made one of the grounds of decision. *Dumont v. Dumont*, 45 Atl. Rep. 107 (N. J. Ch.). A wife sued for divorce in New Jersey; the husband set up his North Dakota decree of divorce. It was held that, since his perjury as to his domicil and as to the desertion of his wife induced the judgment, it would be considered invalid. The case is clearly well disposed of upon the first ground; the lack of jurisdictional facts from whatever cause may always be shown. But the second ground is questionable. Fraud alleged may be either of the court in pronouncing judgment or of the party in procuring judgment. In the first case,

the defence is, it seems, valid ; for really no judicial decision has been given. See *Vadala v. Lawes*, 25 Q. B. D. 310. But in the principal case, as is usual, the fraud is of the second kind. In that case the one proper process would seem to be to reopen the judgment by direct proceedings where it was rendered. If a domestic judgment might be upset collaterally for fraud, a foreign judgment might also be, — but not necessarily. See *Pemberton v. Hughes*, [1899] 1 Ch. 781. But if a domestic judgment may not be so questioned, — and such is all but universally the case, — then, upon the principles above recited, a foreign judgment certainly should not be. See *Dow v. Blake*, 148 Ill. 76.

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TAXATION OF CHOSSES IN ACTION. In *City of New Orleans v. Stemple*, 20 Sup. Ct. Rep. 110, the plaintiff, a resident of New York, owned credits evidenced by notes secured by mortgages on real estate in New Orleans. These were in the hands of an agent for collection in New Orleans. The plaintiff urged her foreign residence to restrain the defendant from taxing these notes under La. Acts 1890, c. 106, which provided for the taxation of all credits arising from business done in the state irrespective of the owner's domicile. The court, however, declared that these credits had assumed a concrete form in the notes that evidenced them ; that as chattels they were taxable where they were actually situated, no matter where their owner resided ; that therefore the act was within the power of a legislature. The leading case of *State Tax on Foreign-held Bonds*, 15 Wall. 300, had to be disposed of, but that caused little difficulty. There it was held that the taxing power of a state did not extend to the mortgage bonds of a domestic railway corporation while in the hands of non-resident owners ; but it was admitted that in some instances certain securities could be taxed irrespective of the domicile of the creditor. State bonds, bonds of municipal corporations, and the circulating notes of banks, — these securities had so far a tangible existence as to be regarded, for the purposes of taxation, not as choses in action but as chattels. A legislature which could reach their actual *situs*, then, could tax them. And this has been extended to include shares of stock in national banks. *Tappan v. Merchants' National Bank*, 19 Wall. 490.

The present case is clearly not inconsistent with the point actually decided in *State Tax on Foreign-held Bonds*, for there the evidences of the debt were out of the state in the possession of non-resident bondholders. Nor is it inconsistent with any of the court's language. While one may hazard a conjecture that had the evidences of the claims been actually situated in Pennsylvania the decision would have been the same, still the court expressly emphasized the possession of the foreign holder. The whole effect of the present case would seem to be that it establishes another class of evidences of debts — notes secured by mortgages — which may be taxed at their actual *situs* independent of the domicile of the owner of the chose in action. And on principle it is difficult to distinguish between these and shares in a national bank or municipal bonds. The question is one for the legislature, which may well be guided, though not conclusively, by business usage. 10 HARVARD LAW REVIEW, 244. It must be noted that the result reached in the present case may lead to double taxation, — at the *situs* of the security and at the domicile of the owner, — unjust but legal.



**GRAIN RECEIPTS — MODIFICATIONS BY PAROL.** — In Minnesota, Gen. St. 1894, §§ 7645-7651, if a bailor deliver grain to a bailee for storage, the bailee must give a written receipt for the grain, and that receipt then becomes negotiable like a bill of lading. In *Thompson v. Thompson*, on rehearing, 81 N. W. Rep. 543 (Minn.), a holder of a warehouse receipt made a parol agreement with the bailee which in effect relieved the bailee from the duty of insuring against fire, which he had been bound to do by the receipt. The grain was burned. The court held that the warehouseman could not show the later agreement to modify the receipt. They rest mainly on two grounds, — first, that the statute requires such a receipt to be in writing, and therefore all changes in it; second, that, in regard to the public nature of such contracts, it is necessary that they be in perfectly definite form for commercial purposes, — of negotiation, etc.

It is very hard to go along with the court. The statute required that a bailee of grain should give a written receipt, and then enacted that such receipts should be negotiable. In this case the holder of such a negotiable receipt agreed with the warehouseman that a different contract should be substituted for the one evidenced by the receipt. The substituted contract was partly oral; but why is it against the statute? When the Statute of Frauds requires certain agreements for sale to be in writing, a subsequent oral agreement cannot be substituted for a written agreement for such sales, because then in effect an oral sale would be the result. The court in effect say that their statutes in regard to grain receipts are like the Statute of Frauds; but that is very doubtful. The fair meaning of the statutes is that a bailor of grain may require a written receipt which will be negotiable, — not that a contract of bailment of grain is null without writing. Such a far-reaching statute as that — a second Statute of Frauds — could not have been intended. The principal case seems quite on all-fours with a case where the holder of a promissory note extends the time of payment. That subsequent agreement varies the specialty, yet it is undoubtedly a good contract for the payment of money. The Minnesota decision has succeeded in creating a mercantile specialty more iron-bound than a promissory note, and has found a Statute of Frauds in regard to bailments of grain which, it seems, was never intended.

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**ASSOCIATED PRESS AS A PUBLIC CALLING.** — What calling is so far affected with a public interest that it may be the subject of regulation? The case of *Munn v. Illinois*, 94 U. S. 113, and its following seem to point to the doctrine that the courts will not set any limits to the legislative determination of what callings concern the public save the limits of reason. But it is a very different question how far the courts themselves may declare a calling public and subject to regulation like the common carriers. In the early history of the common law the king's judges interfered with a greater number of employments than do courts at present, but their interference was mainly along two lines, — first, in regard to monopolies; second, in regard to the trades connected with travel, with the carrier, the innkeeper, the smith. Then that power of the courts fell into disuse till the innkeeper and the common carrier held a unique position in the law. In the present century — because perhaps of the freedom of legislative regulation and the growth of new indus-

tries, and because the new industries were managed by corporations—certain courts have attempted to broaden the field of their control, and now the Supreme Court of Illinois, in the case of *Inter-Ocean Publishing Co. v. Associated Press*, National Corporation Reporter, Feb. 22, 1900, has decided that the Associated Press is subject to judicial regulation like a carrier, and that its by laws disciplining its members who dealt with news agencies are against public policy and void.

While one would wish rather that the regulation of new callings and the definition of the proper subjects for regulation be left, more appropriately, for the legislatures, yet the present case may probably be supported. The Associated Press is in fact a purveyor of telegraphic intelligence, which it supplies, not by special contract, but in bulk to its customers.

It has been held that the ordinary despatch company which contracts for the transmission of freight by means of other carriers is subject to judicial regulation. *Buckland v. Adams Express Co.*, 97 Mass. 124. The Associated Press stands toward the telegraph companies in much the relation that the despatch company stands to its railroads; and whenever the telegraph companies are held subject to regulation, it is not clear why, by analogy, the Associated Press should not be subject to a like restraint. The court, it seems, chose to rest on the ground that the Associated Press is virtually monopolistic. In view of the fact that it is still engaged in crushing competitors, it seems this is doubtful.

THE INTEREST OF THE BENEFICIARY OF A LIFE INSURANCE POLICY. — The prevailing idea that the beneficiary named in a life insurance policy has in some way a vested interest appears to have had its origin in what would seem a somewhat strained interpretation of the statutes which provide that on the death of the insured the insurance money shall go to the beneficiaries named in the policy, to the exclusion of the creditors of the insured. *Connecticut Insurance Co. v. Burroughs*, 34 Conn. 305. The later authorities, however, apparently prefer to interpret the taking out of the policy in the beneficiary's name as a declaration of trust, but usually allow the beneficiary to proceed at law on the policy. *Pingree v. National Insurance Co.*, 144 Mass. 574.

A recent case illustrates the indifference of some courts as to the basis of the rule. *Jackson Bank v. Williams*, 26 So. Rep. 965 (Miss.). The plaintiff was the beneficiary named in a policy of insurance on her husband's life. The husband pledged this policy with the defendants as security for a loan. The court said that if the plaintiff did not have a vested right at common law, one was given by the statute regulating the distribution of the proceeds on the death of the insured, and held that without repayment of the loan the plaintiff could recover the policy in replevin. Neither of the views generally advanced to explain the decisions on this subject can be considered satisfactory. The insured never intended to become a trustee. The transaction was merely a unilateral contract by which the insurance company agreed to pay a certain amount to the beneficiary on a contingency happening. 1 HARVARD LAW REVIEW, 157. It is also never denied that the insured has a perfect right to put an end to the *res* at any time by the non-payment of the premiums, which is hardly consistent with a trust relation. Nor do the statutes afford a more satisfactory explanation, for, apart from their evident rela-



tion only to the proceeds of the policy, after the death of the insured, the same result has been reached as easily in their absence as in their presence. *Central Bank v. Hume*, 128 U. S. 195; *Robinson v. Accident Association*, 68 Fed. Rep. 825 (Cir. Ct., Mo.). The absence of any clearly understood principle is forcibly brought out by the decisions that the beneficiary named in mutual benefit certificates has no vested interest, though there would seem in this respect to be no sound distinction between these and the ordinary policies. *Supreme Conclave v. Capella*, 41 Fed. Rep. 1 (Cir. Ct., Mich.). The authorities are also about evenly divided as to whether, in the event of the beneficiary predeceasing the insured, the latter would not obtain full control over the disposition of the policy, which of course is inconsistent with the beneficiary having an absolute and vested interest.

A possible justification for the decisions giving the beneficiary a vested interest, might be found in that, strictly, the personal representatives of the insured in an action for a breach of the contract in the policy would only be entitled to nominal damages, and to prevent this failure of justice the beneficiary should be allowed to enforce a specific performance of the contract. While the proper remedy would be in equity, the courts might well allow him to proceed at law on the same grounds on which replevin has been held to lie against a fraudulent vendee. This line of reasoning derives some support from the fact that in England, where the beneficiary of a simple contract is not allowed to sue on the contract, the beneficiary of an insurance policy has been held, in a case where the English statute did not apply, to have no rights whatever, whether legal or equitable, in the contract made by the insurance company with the insured. *Cleaver v. Mutual Insurance Co.*, [1892] 1 Q. B. 147. While here, where the contrary doctrine generally prevails, the court in a recent case declared the rule that the beneficiary has a vested interest to be founded on "the well-known principle of the law of contracts." *N. Y. Insurance Co. v. Ireland*, 17 S. W. Rep. 617 (Tex., Sup. Ct.).

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THE RIGHT TO CHANGE RIVER CHANNELS. — The case of *County of York v. Rolls*, Canadian Law Times, Feb. 1900, presents a state of facts seldom passed on. An unusual freshet changed the channel of a river, and washed away part of the land of the defendant, a riparian proprietor. Shortly after the flood subsided he filled in the places washed out, and thus turned the stream back to its original bed. It was held that he was entitled to do this at any time before a prescriptive right or a right by estoppel to keep the stream in the new channel was acquired against him. The only case which seems to present a similar point is that of *Woodbury v. Short*, 17 Vt. 387. There the action of a flood caused an alteration in the river channel, and it was said that the defendant might have returned the stream to the original bed had not his laches in this particular case been such as to restrain him on the theory of acquiescence. Both cases thus recognize the right of the owner as a sort of natural right, which may nevertheless be overcome. But what is sufficient to prevent the exercise of the right is hardly mentioned by the authorities. The doctrine of acquiescence which is referred to in *Woodbury v. Short*, *supra*, as the basis for denying the right to return the stream to the old channel, means nothing more than that as the defendant has neglected to use his right for a certain time he must be considered

as giving it up. But that doctrine seems too indefinite to be of any legal value. In the later case of *Ford v. Whitlock*, 27 Vt. 265, it was said that the true principle for this class of cases was to be found in an analogy to the rules of dedication of land to public uses. And this seems to have met the approval of some text-writers. Gould, Waters, 2d ed. p. 320. But it seems doubtful if the analogy is sound, for we can find no act of dedication in the mere neglect of the defendant to turn the stream back; nor is there a particular act of acceptance on the part of any individual or of the public. It would therefore be necessary to place this case on the footing of an implied dedication and acceptance. But here the rule is that when "the only evidence of the dedication of a way is its having been used as such by the public, such user, in order to constitute sufficient evidence of such dedication, must have continued for at least twenty years." Washburn, Easements, 4th ed. p. 220. And in this country it is not settled that user for a length of time shorter than the statutory period is a sufficient acceptance. The present case, where the defendant's neglect was of much shorter duration, cannot be decided on principles of dedication. It is also impossible to say that there is here an analogy to a license; for it is clear that the mere abstention from using is not in fact a license to other owners. Granted, however, a natural right to return the stream to the old bed, it may well be that the neglect to do so leads other proprietors to change their positions. And in such a case one may well find the basis for an estoppel *in pais* — a more satisfactory basis than that suggested by the authorities for stopping the landowner in the exercise of his right.

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CUSTODY OF INFANTS. — The recent case of *In re Minors of Charles and Anna Luck*, Weekly Law Bulletin, Feb. 19, 1900, illustrates the modern attitude of the law as to the custody of young children. There Charles and Anna Luck before their marriage agreed that children of the union should be trained in the religious faith of the mother. After the mother's death the two infant children were taken by relatives of the father who entertained his religious belief. Four years later the father died. Applications for guardianship were then made by relatives of both the father and the mother, representing opposing religious beliefs. It was held that the relatives of the father should keep the children. Notwithstanding the agreement, the four-year period of training with the father's relatives had created attachments it was not wise to break. The case goes squarely upon the modern view that in questions of custody the welfare of the child is the paramount consideration.

Such, however, has not always been the attitude of the courts. An examination of the Roman law reveals that no such idea could be entertained. The child was then more nearly a species of property. 8 HARVARD LAW REVIEW, 39. The development of the English law, however, shows the gradual growth of the idea that justice might demand a consideration of the welfare of the child in granting its custody. There was both a chancery and a common law jurisdiction in these matters. *Queen v. Gynzall*, [1893] 2 Q. B. 232. From early times the former was exercised in accordance with the theory of the rights of the Crown over its subjects. Hence it often assumed the right to act as the welfare of the child demanded. But a harsher doctrine appeared in the common law court in proceedings on the writ of habeas corpus. Here it was said that



the father had a right to the custody of the child. *Rex v. Greenhill*, 6 Nev. & Man. 244. Accordingly, the child was given to him even when it might seem wiser to have given it to another. The continued refusal of the courts to exercise a discretion in the matter was finally met by the passage of the Talfourd Act, 2 & 3 Vict. c. 54, which expressly allowed the court of chancery, in its discretion, to give the mother access to the children in custody of the father, and further to give custody of infants under seven to the mother. This age was later increased to fourteen years. Now, by 36 & 37 Vict. c. 66, the rules of equity in relation to the custody of infants are to prevail in the common law courts. By the present English law there is thus a recognition of the interest of the child, but one still sees a tendency to regard the right of the father as controlling, and the cases therefore are not always free from technicalities. Hochheimer, *Custody of Infants*, 2d ed. p. 33. The American cases seem never to have held with such strictness to the idea of the father's paramount right. Schouler, *Domestic Relations*, 5th ed. § 248. That right has been recognized, but at the same time the broader view has been taken that the child has rights of its own which the court may protect to subserve the present and future interests of the infant. *United States v. Green*, 3 Mas. 482. This idea that the child is but a young citizen entitled to all the advantages possible to secure to it is the most advanced which the cases have presented, and the principal case is clearly right in declaring that the welfare of the child itself is the important factor in determining its custody.

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CORPORATION NAMES. — A novel question was presented in two recent New York cases, *Colonial Dames of America v. Colonial Dames of New York*, 60 N. Y. Supp. 302 (Sup. Ct., Sp. Term, New York Co.), and *Society of Eighteen Hundred and Twelve v. Society of 1812 in the State of New York*, New York Law Journal, Jan. 23, 1900. In each a membership corporation, organized ostensibly for patriotic purposes, sought an injunction to restrain a similar corporation from using a name so nearly resembling that of the plaintiff corporation as to cause confusion. In neither case had the plaintiff sustained any pecuniary damage, but in each an allegation was made of the probability of such damage in the future. The injunction was refused in the first case on the ground that no injunction could be granted for the non-fraudulent use of a name when there was no interference with any trade of the plaintiff. In the later case, in which the former does not appear to have been mentioned, the injunction was granted, apparently on the broad principle that the probability of the purposes for which the plaintiff corporation was organized being injuriously affected by the defendant's use of a similar name was a sufficient ground for injunctive relief. The court also intimated that the case came within the rules governing an infringement of trade names.

While one must sympathize with the desire of the court to protect the prior corporation, it is difficult to see that any right was violated by the defendant. And admitting that there was here *damnum*, which, indeed, in neither case satisfactorily appeared, for an action to lie there must also be *injuria*. In a leading case in which a somewhat similar question was involved, *Day v. Brownrigg*, 10 Ch. D. 295, the plaintiff was damaged by the defendant calling his adjoining property by the name by which the plaintiff's had been known for sixty years, and it was urged that alone

was sufficient ground for an injunction. But the Court of Appeals held that there must also be a right violated, either legal or equitable, and that with the exception of trade marks and trade names there was no exclusive property in names. The court further expressly disclaimed the power of widening the application of this exception. The case of trade marks and trade names rests on a peculiar principle. The prior user has acquired a reputation for these names by their use in his business, and to permit another to employ them in a similar way would be to permit a fraud both on him and the public by which he would sustain pecuniary damage. 12 HARVARD LAW REVIEW, 349. A business conducted with the object of gain is necessarily presupposed, and in no proper sense could these membership corporations be brought within that class. They were in no way engaged in trade, but were in reality more in the nature of charitable organizations, and their members, so far from looking for profit from their operations, could only be subject to burdens. Unless the case could be considered one for the application of the rule governing trade names, which it is evident it cannot, there would seem to be no possible support for the second decision either in principle or authority. Apart from statutory provisions, there can be no sound distinction between a corporation and a personal name, and in the latter case there has never been any doubt but that by the common law, with the exception of trade names, no exclusive right to a name can be acquired. *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430.

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SIGNATURES OF WILLS. — The Court of Appeals of New York has again affirmed the rule that the signature of a will must be at the physical end of the document. *In re Andrews*, New York Law Journal, March 7, 1900. But the vigorous protest in the Appellate Division shows that, even under a statute which requires the signature at the end of a will, there may well be a difference of opinion as to the real meaning of the true "end." In the principal case the testatrix wrote a will on three sides of a folded paper, commencing on the first page and continuing on the third page, at the top of which was written "second page." She at length completed and signed the instrument on a page marked "third page," which in fact was the second page of the sheet. It was held that the will was not signed at the end within the meaning of the statute, and it was accordingly not probated.

Statutes requiring such formalities have been passed usually with a view to preventing frauds upon the testator by additions or interlineations. But the development of the English cases seems to show that the requirements need not be carried to the extent of admitting only those wills which are signed at the physical end. By 1 Vict. c. 26, the position of the signature was required at the end or the foot of the will. It became common to construe this requirement strictly, and thus in many cases the results were extremely harsh. Sugden, *Real Property Statutes*, p. 311. But no case appears to be reported presenting the exact point of the principal case. The discussion in nearly every instance turned on the amount of space between the last line of the instrument and the signature. For the express purpose, then, of preventing such decisions the 15 & 16 Vict. c. 24, was passed. And this by its reference to the previous enactment and by its enumeration of specific cases arising under it is shown to be merely an explanatory statute. Accordingly, it has been held



repeatedly, that when a will was written on the first and third pages of a sheet and signed on the second it was good. *In re Coombs*, L. R. 1 P. & D. 302; *In re Stoaks*, 23 W. R. 62. The result of the English cases seems eminently satisfactory, but it is conceived that it is not necessary to adopt their expedient of extra legislation in order to reach it. For why is it not a fair and sensible construction of such statutes as those in question to hold that "end" means what in fact the testator made the end? It certainly is in point of time the end, even though it be on the second page. Further, since it clearly expresses his completion of the instrument as well as though placed at the physical end, the evils which the statutes aimed to prevent are avoided. *Tonnele v. Hall*, 4 N. Y. 140. A more serious effect of the strict view has been said to be the failure of incorporation by reference of those clauses which might come after the signature or of documents attached to the will. That certainly is an objection, as there is enough value in the doctrine of incorporation to retain it. On the whole, therefore, it seems that one might well regard a statute requiring a testator's signature at the end of a will to mean that it shall be the end in point of time.

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TESTIMONY ON A FORMER TRIAL BY A WITNESS SINCE DECEASED. — The law as to the admissibility on a subsequent trial of the testimony of witnesses deceased since the former trial, like many other topics of the law of evidence, is in a far from satisfactory condition. The rule is generally stated that for the testimony to be admissible the cause of action must be the same, and, if not between the same parties, they must at least be privy in law, in blood, or in estate to those of the former trial. Professor Wigmore, possibly with the intention of placing the rule on some rational basis, in his edition of Greenleaf on Evidence, § 163 a, states that, as regards the parties to the suit, "all that is essential is that the present opponent should have had a fair opportunity for cross-examination." On this passage the plaintiff in a recent case largely relied. *Metropolitan Railway Co. v. Gumby*, New York Law Journal, Feb. 6, 1900. In an action by a parent for the loss of a child's services through an injury to the child by the defendant's alleged negligence, the court permitted to be read the testimony of a deceased witness of the accident in a previous action brought by the infant's guardian *ad litem* against the defendant for the same injury. On a writ of error, the court held that, there being no privity between the plaintiffs in the two actions, the evidence was wrongly admitted.

While it is evident there is no underlying principle on which this limitation requiring privity between the parties offering the evidence in the two cases may be supported, no fault can be found with the decision, as it is probably as well for the courts to adhere closely to precedent in decisions on the law of evidence. The established rule requiring privity between the parties, for this evidence to be admissible, is apparently based on the same misconception as the doctrine that the admissions of a grantor are evidence against his grantee; namely, that the rule that the grantee's substantial rights may be cut down by the acts of the grantor before conveyance has some application to the evidence admissible in a suit to which the grantee is a party. Undoubtedly one should only get the interest his grantor had to give, but it is an altogether different matter to allow the acts of the grantor to affect in this way the evidence admis-

sible in a suit by the grantee. *Paige v. Cagwin*, 7 Hill, 361. The argument of the court in *Morgan v. Nicholl*, L. R. 2 C. P. 117, that for the evidence to be admissible against one it must be admissible against both, would seem without foundation. Of course the plaintiff here could justly object to its admission, because he had no opportunity to cross-examine the witness, but why should the defendant object who had? The cases of *res judicata* and estoppel, which are often cited as indicating the proper rule for this subject, rest on an entirely different principle.

There has, indeed, in some jurisdictions, been a slight deviation from the general rule in criminal causes. In a civil trial for an assault, the evidence of a deceased witness given in a criminal trial for the same assault has been admitted. *Kreuger v. Sylvester*, 100 Ia. 647. And *dicta* are occasionally found that if the opposite party had the right of cross-examination it is sufficient. Undoubtedly this desirable result will eventually be reached.

## RECENT CASES.

AGENCY — UNLAWFUL ACTS — LIABILITY OF CORPORATION. — The plaintiff left defendants' train before reaching the station for which he had bought a ticket. The station master, by locking the only door of the station, detained him to compel a surrender of this ticket. *Held*, that the defendants are liable for the false imprisonment. *Farry v. Great Northern Ry. Co.*, [1898] 2 Ir. 352.

The court recognizes the English doctrine that a corporation cannot be held incidentally authorize the commission of unlawful acts by its agents, since the corporation has no authority to commit such acts itself. *Poulton v. London, etc. Ry. Co.*, L. R. 2 Q. B. 534; *Barry v. Dublin, etc. Co.*, L. R. 26 Ir. 150, but holds that in this case, although the detention was unlawful, yet locking the door was lawful and within the scope of the agent's authority. This reasoning seems artificial, for locking the door was the very act which caused the detention, and must have been equally unlawful. Moreover, the English doctrine itself can hardly be regarded as sound, inasmuch as corporations clearly have the physical power, without legislative authority, to commit unlawful acts, and the logical result of the argument is to exempt all principals from liability for their agents' torts which are not expressly authorized. A better view is that unlawful as well as lawful acts may be within the incidental powers of the agents of a corporation. *Howe v. Newmarch*, 94 Mass. 49; *Johnston v. South Western R. R. Bank*, 3 Strob. Eq. 263. The above decision reaches an undoubtedly correct result, and shows a desire of the court to limit the application of the English doctrine where possible.

BANKRUPTCY — RIGHTS OF TRUSTEE IN PREMISES LEASED TO BANKRUPT. — The premises were leased to the bankrupt upon an unexpired lease. The landlord brought ejectment against the trustee, who had continued the possession. Upon the petition of the trustee for an injunction, *held*, that the court will allow the trustee, without affirming the lease, to continue the possession for such time as may be reasonably necessary for the execution of his trust, upon the payment to the landlord of compensation. *Re Chambers, Calder & Co.*, 98 Fed. Rep. 865 (Dist. Ct., R. I.).

It is a general principle that all property of the bankrupt passes to the trustee, except that he may reject unprofitable property. See *American File Co. v. Garrett*, 110 U. S. 295. Accordingly, as regards a lease, the trustee, unless restrained by the terms of the lease, may adopt it or reject it, as he judges for the best interests of the estate. *Re Breck*, 8 Ben. 93; *Commonwealth v. Franklin*, 115 Mass. 278. It has been tacitly assumed that the trustee must either affirm or disaffirm, and is only entitled to the protection of equity for a reasonable time in which to come to a decision and upon payment of compensation to the landlord. *Re Laurie*, 4 Nat. Bank. Reg. 7; *Re Washburn*, Fed. Cas. No. 17211; *Re Metz*, 6 Ben. 571. The proposition of the principal case, however, is very different; that the trustee without affirming the lease may hold possession for such time as is reasonable for the execution of his trust upon payment of compensation for the occupation. This view is without authority, but it commends itself as just; for otherwise the coercion of the situation might force the trustee to incur great loss.



**BANKRUPTCY — WHAT CORPORATIONS MAY BE ADJUDICATED BANKRUPTS. —** *Held*, that a water supply corporation cannot be adjudicated a bankrupt. *Re New York, etc. Co.*, 98 Fed. Rep. 711 (Dist. Ct., N. Y.).

The operation of the Bankruptcy Act of 1898, § 4, is restricted to "corporations engaged principally in manufacturing, trading, or mercantile pursuits." The act of 1867, § 37, applied more broadly to all "moneyed, business, or commercial corporations." Hence decisions under that act do not aid much in construing the present act. See, however, *Re Chandler*, 2 Lowell, 478; *Re Merchants', etc. Ins. Co.*, 3 Biss. 162. The present provision is as yet undefined, except that it has been held that a mutual insurance company is not "engaged in mercantile pursuits," *Re Cameron, etc. Ins. Co.*, 96 Fed. Rep. 756 (Dist. Ct., Mo.); while a sanatorium corporation is so engaged, *Re San Gabriel Co.*, 95 Fed. Rep. 271 (Dist. Ct., Cal.). The principal case admits that if the water had been sold in bottles or casks it would have been a mercantile pursuit; and that the supply came through pipes seems an insufficient ground of distinction. Certainly there is none in economic theory, and probably none in common understanding. This dealing in water seems "buying or selling" or "traffic," — for such are the tests suggested. Accordingly, the principal case is to be questioned.

**CARRIERS — TELEGRAPH COMPANIES — REGULATIONS. —** The defendant telegraph company made a regulation requiring claims for damage, caused by the company's failure to correctly transmit messages, to be made within sixty days after the message was sent. *Held*, that the regulation is unreasonable and void. *Davis v. Western Union Tel. Co.*, 54 S. W. Rep. 849 (Ky.).

This case represents the law in Kentucky and a few other jurisdictions. *Western Union Tel. Co. v. Eubank*, 100 Ky. 591; *Meadors v. Western Union Tel. Co.*, 96 Ga. 788. The overwhelming weight of authority, however, is contrary to this view. *Findlay v. Western Union Tel. Co.*, 64 Fed. Rep. 459 (Cir. Ct., Va.); *Albers v. Western Union Tel. Co.*, 98 Iowa, 51; *Western Union Tel. Co. v. Beck*, 58 Ill. App. 564. The latter view seems the more reasonable. A rule of this kind is a practical necessity for such companies because of the great amount of business done by them, and the impossibility of keeping the records as evidence for any great length of time. No great hardship is likely to result, as two months would, in all but exceptional cases, give the sender ample time to learn of the non-delivery of the message and to notify the company.

**CONFLICT OF LAWS — FOREIGN JUDGMENT — DEFENCE OF FRAUD. —** *Held*, that fraud may be pleaded as a defence to a foreign judgment. *Dumont v. Dumont*, 45 Atl. Rep. 107 (N. J., Ch.). See NOTES.

**CONFLICT OF LAWS — TAXATION — CHOSE IN ACTION. —** The plaintiff, a resident of New York, owned credits evidenced by notes secured by mortgages on realty in New Orleans. These notes were in the hands of an agent for collection in New Orleans. An act of Louisiana taxed credits arising from business done in the state irrespective of the domicile of the owner. *Held*, that under this statute these credits of the plaintiff may be taxed. *City of New Orleans v. Stemple*, 20 Sup. Ct. Rep. 110. See NOTES.

**CONSTITUTIONAL LAW — LIMITS OF THE POLICE POWER. —** The defendant violated a city ordinance, authorized by statute, which prohibited the sale of meat, fish, butter, or other provisions in any place of business where dry goods, clothing, or drugs were sold. *Held*, that as it in no way tends to protect the safety, health, morals, or welfare of the public, the ordinance is not within the police power; that it is therefore a deprivation of liberty and property without due process of law, and so forbidden by both the constitution of the United States and of the state. *Chicago v. Netcher*, 55 N. E. Rep. 707 (Ill.).

The court, in declaring a law unconstitutional, exercises much the same function that it does in revising the verdict of a jury. *Ogden v. Saunders*, 12 Wheat. 213. Now it is well known that butter, milk, etc., absorb impurities, and it is also true that ready-made clothing often comes from the sweat-shops. To say, therefore, that a law which forbids the sale of these articles in the same store does not reasonably tend to promote the public health and welfare seems extraordinary. The tendency in Illinois is shown by a recent decision of the Superior Court holding unconstitutional a law which forbade the use of the American flag for advertising purposes. It was declared not within the police power, because it did not concern the public health, morals, or safety. *People v. Kruse*, Chicago Daily Law Bulletin, Nov. 21, 1899. The doctrine that such a law is a deprivation of liberty and property without due process of law is not new in that state, and if mere authority could make right the continued limitation of the legislative function, the present case could not be criticised. *Fraser v. People*, 141 Ill. 171; *Braceville Coal Co. v. People*,

147 Ill. 66. Regulation of the legislative power to such narrow limits cannot be expected to stand the test of time. *Commonwealth v. Alger*, 61 Mass. 53; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9; *Wurts v. Hoagland*, 114 U. S. 606.

CONSTITUTIONAL LAW — PROCEDURE — NEW QUESTION ON APPEAL. — A judgment was based on an unconstitutional statute. *Held*, that it must be reversed on appeal, though the constitutional question was not raised in the court below and there is no error in the record. *Monticello Distilling Co. v. Mayor of Baltimore*, 45 Atl. Rep. 210 (Md.).

The Maryland Code provides that no matters shall be considered on appeal which were not presented and determined in the trial court. *Cherbonnier v. Goodwin*, 79 Md. 55. In jurisdictions where this rule prevails, it is almost universally held in civil causes that constitutional questions cannot be raised for the first time on appeal. *Chiniquy v. People*, 78 Ill. 570; *Hopper v. Chicago, etc. Ry. Co.*, 91 Iowa, 639; *Delancy v. Brett*, 51 N. Y. 78. The theory of the principal case appears to be that it is the duty of the court to check violations of the constitution whenever the opportunity offers. The opposing cases are more in harmony with the sounder view, that a court should not pass upon the validity of a legislative act unless the case before it cannot be disposed of otherwise. *Ex parte Randolph*, 2 Brock. 447. It is difficult to see how, under this well-established rule, a court can be justified in making an exception to an express statutory enactment, for the sake of declaring a statute unconstitutional.

CONTRACTS — DEBT — EFFECT OF RECEIPT. — The plaintiff gave to the defendants a receipt in full of his demands upon them, because they refused to pay any more money without it. *Held*, that in the absence of fraud or mistake the plaintiff has precluded himself from further recovery. *Flynn v. Hurlock*, 45 Atl. Rep. 312 (Pa.).

It is a well-settled common law doctrine that payment of part of a debt in satisfaction of the whole is not a full discharge. *Foakes v. Beer*, 9 App. Cas. 605; *Fire Ins. Assn. v. Wickham*, 141 U. S. 564. But the results of this rule are so unsatisfactory that the courts have made certain arbitrary exceptions to its universal application. Thus the rule has been held not to apply when a debtor is insolvent, or even honestly believed to be. *Shelton v. Jackson*, 49 S. W. Rep. 414 (Tex.); *Rice v. London etc. Co.*, 70 Minn. 77. The holding in the principal case, that a written receipt is equivalent to release under seal, is clearly another exception, for a receipt is generally regarded merely as evidence of payment. *Harriman, v. Harriman*, 78 Mass. 341. This view is adopted in a few jurisdictions. *Gray v. Barton*, 55 N. Y. 68; *Green v. Langdon*, 28 Mich. 221. It would seem, however, better policy that the amendments to such a well-established rule be made by the legislature rather than the courts. This has been done in a number of states. *Clayton v. Clark*, 74 Miss. 499. See 12 HARV. LAW REV. 525.

CORPORATIONS — CORPORATION DE FACTO — EXPIRATION OF CHARTER. — The defendant was sued as a corporation, and pleaded the expiration of its charter before action brought. *Held*, that it is capable of being sued as a *de facto* corporation, and is estopped to deny its corporate existence. *Brady v. Delaware Mutual Life Ins. Co.*, 45 Atl. Rep. 345 (Del., Super. Ct.).

All transactions with the company with reference to the insurance policy sued on had taken place before the expiration of the charter. The plea did not deny that the contract was binding upon the corporation, but alleged that since the making of it the corporation had ceased to exist. It is difficult to see what bearing estoppel can have upon this defence. Nor can the case be supported on the ground that, in spite of the expiration of the charter, the defendant remained a *de facto* corporation whose existence could be questioned only by the state in *quo warranto* proceedings. There can be no corporation *de facto* except under color of law. *Snyder v. Studebaker*, 19 Ind. 462. And when a corporation is chartered for a limited time there is no law which can give color to its existence after the time has expired. Accordingly, it has generally been held that the expiration of a corporation's charter works a dissolution *ipso facto*, after which the corporate existence may be denied in any proceeding where the question may arise. *Bradley v. Repell*, 133 Mo. 545; *Krutz v. Paola Town Co.*, 20 Kan. 397; *Sturges v. Vanderbilt*, 73 N. Y. 384. It seems, therefore, that the plea in the principal case was good, and that the plaintiffs should have been left to their remedy against the corporate assets.

CRIMINAL LAW — INDECENT EXPOSURE — PUBLICITY. — The defendant, in a field adjoining a highway, intentionally exposed his person to one female. There was no evidence on the record that others saw the act, or that they were in a position to have seen it. *Held*, that the defendant is not indictable for indecent exposure. *Morris v. State*, 34 S. E. Rep. 577 (Ga.).



The cases in point are conflicting. Some hold that a person is only indictable for indecent exposure when the act was done in the presence of several persons, though it is immaterial whether they saw it or not. *Regina v. Farrel*, 9 Cox C. C. 446; *Regina v. Webb*, 1 Den. C. C. 338; *Regina v. Watson*, 2 Cox, C. C. 376. Others have held that such an act is a crime if it was committed in such a place that it was likely to be seen by a considerable number of people. *State v. Roper*, 1 Dev. & Bat. 208; *Regina v. Elliot*, L. & C. 103. The latter view seems preferable. It is more in line with the doctrines of criminal law in regard to other nuisances. *Commonwealth v. Oaks*, 113 Mass. 8; *Commonwealth v. Harris*, 101 Mass. 29. And it seems that, though no one is present, such an act does appreciably endanger the morals of the public. 1 Bish. New Cr. L. § 1130. It is not clear from the language of the court whether it recognized the line of distinction suggested.

**DAMAGES — PUNITIVE DAMAGES — REPLEVIN.** — *Held*, that punitive damages are properly allowed in replevin. *Wiley v. McGrath*, 45 Atl. Rep. 331 (Pa.).

The doctrine of punitive damages is firmly established in most jurisdictions as applicable in general to actions in tort, though not in contract. *Missouri, etc., R. R. Co. v. Humes*, 115 U. S. 512. *Contra*, *Bernard v. Poor*, 38 Mass. 378; *Bixby v. Dunlap*, 56 N. H. 456. In some jurisdictions which allow such damages in other tort actions, they are not allowed in replevin, probably on historical grounds. The principal case, however, is in accord with the majority of the decisions, and states the better view. *Briggs v. Maybee*, 21 Wend. 144. *Contra*, *Butler v. Mehrling*, 15 Ill. 488; *Hotchkiss v. Jones*, 4 Ind. 260. The whole doctrine of punitive damages is, on principle, open to two objections: the state's function of punishment is made over to a private individual, and that individual thereby acquires something to which he is not entitled. But, if punitive damages are to be allowed at all, there seems to be no reason for a distinction between the modern American action of replevin and trover.

**EVIDENCE — EXPERT TESTIMONY — AGE OF HANDWRITING.** — *Held*, that refusal to allow a handwriting expert to testify as to the age of documents offered in evidence is error. *Tally v. Cross*, 26 So. Rep. 912 (Ala.).

The cases on this point are conflicting, but the weight of authority is in accord with the principal case. *Falton v. Hood*, 34 Pa. St. 365; *Bank v. Hobbs*, 77 Mass. 250. *Contra*, *Cheney v. Dunlap*, 20 Neb. 265; *Sackett v. Spencer*, 29 Barb. 180. On this question courts may well differ. Such evidence is certainly entitled to very little weight, for the appearance of any piece of writing is due largely to influences which are practically unascertainable. It seems a better doctrine to allow the trial judge to determine in each particular case whether the jury would be legitimately helped by an expert's opinion. On this view the ruling of the trial judge would not be open to revision, and the principal case may, therefore, be questioned.

**EVIDENCE — MODIFICATIONS BY PAROL — GRAIN RECEIPTS.** — *Held*, that a contract for the storage of grain evidenced by a receipt, which by statute is negotiable like a bill of lading, may not be modified by a subsequent parol agreement. *Thompson v. Thompson*, 81 N. W. Rep. 543 (Minn.). See NOTES.

**EVIDENCE — PEDIGREE — TESTIMONY AS TO CONTEMPORANEOUS FACTS.** — *Held* that the testimony by a member of the family to the common repute in the family is competent on questions of pedigree, both ancient and contemporary. *Smith v. Kenney*, 54 S. W. Rep. 801 (Tex., Civ. App.).

It is universal law, based on necessity, that the declaration of deceased persons who are proved to have been related to the family, are receivable on questions of pedigree, though based on the family repute, and not on the personal knowledge of the declarant. *Monkton v. Attorney-General*, 2 Russ. & M. 147. It is commonly stated that testimony by living members of the family is also admissible under the same circumstances. *Van Sickle v. Gibson*, 40 Mich. 170; *Henderson v. Cargill*, 31 Miss. 367. The better rule, however, is that such evidence is good only as to ancient matters of pedigree, and not as to contemporary facts, there being no adequate reason for the acceptance of hearsay evidence in the latter case. *Doe v. Auldjo*, 5 U. C. Q. B. 171. *In re Hurlburt's Estate*, 68 Vt. 366. The doctrine of the principal case, therefore, might well be qualified.

**EVIDENCE — PRIVILEGE — ATTORNEY AND CLIENT.** — In an action to contest a will, the testimony of an attorney, who was a subscribing witness, as to communications made to him by the testator in reference to the will, was excluded. *Held*, that it should have been admitted. *Kern v. Kern*, 55 N. E. Rep. 1004 (Ind.).

The general rule is, that a legal adviser cannot be permitted to disclose communica-

tions, made to him in that capacity, unless the client consents. *Greenough v. Gaskell*, 1 Myl. & K. 101; *Higbee v. Dresser*, 103 Mass. 523. This is in order that confidential communications may be made to an attorney without apprehension of disclosure. Exception is generally made to this rule, in cases of contested wills, as to communications made by the testator. It is said that, where both parties claim under the client, the reasons for the rule no longer apply. *Russell v. Jackson*, 9 Hare, 387; *Doherty v. O'Callaghan*, 157 Mass. 90. But this reasoning seems hardly sound, as even in such a case the real interests of the testator may still demand secrecy. The principal case can be supported, however, on the sounder view, that by making the attorney a subscribing witness the testator has waived the privilege. *Denning v. Butcher*, 91 Iowa, 425; *Alberti v. New York, etc., Ry.*, 118 N. Y. 77.

EVIDENCE—PRIVILEGED COMMUNICATION—ATTORNEY AND CLIENT.—The plaintiff was present at, and took part in, a consultation between an attorney and his client. *Held*, that the plaintiff's statements to the attorney are privileged, and the defendant cannot compel the attorney to testify to them. *Hartness v. Brown*, 59 Pac. Rep. 491 (Wash.).

The English, and a number of the American courts, treat all communications to an attorney as privileged, whether made by the client in person or by a third party on his account. *Greenough v. Gaskell*, 1 Myl. & K. 98; *In re Aspinwall*, 7 Ben. 433. The principal case follows this line of decisions. On the other hand, many courts hold that no communication is privileged unless made by the client personally, and not in the presence of third persons. *People v. Buchanan*, 145 N. Y. 1; *In re O'Donoghue*, Fed. Cas. No. 10435. On principle, it seems that the latter rule is preferable. The doctrine of privilege is founded on public policy. But such a serious exemption from the ordinary duties of witnesses should be confined as narrowly as is consistent with the policy in which it originates; and there appears to be no reason for extending it further than to cover confidential communications between the attorney and his client.

EVIDENCE—VIEW BY JURY—VALUATION OF LAND.—In proceedings to assess the value of land taken by eminent domain, *held*, that the impressions acquired by the jury after a view of the *locus in quo* are competent evidence. *Chicago, etc., Ry. Co. v. Farwell*, 81 N. W. Rep. 440 (Neb.).

When the jury is called upon to assess the value of land, the doctrine of this case is adopted by the weight of authority. *Parks v. Boston*, 32 Mass. 798; *Springfield v. Dalby*, 139 Ill. 34. Some courts, however, hold that the view by the jury can be used in such cases only to aid in applying the evidence given in court. *Close v. Samm*, 27 Iowa, 503; *Muchader v. Williams*, 54 Ohio St. 344. This restriction is almost always imposed where the purposes of the view are other than the valuation of the land. *Wright v. Carpenter*, 49 Cal. 607. Such a distinction seems based on no sound reasons, and the doctrine of the principal case might better be applied to all cases. The impressions of the jury should be better evidence than the second-hand reports of witnesses, and to ask the jury to forget what they have learned does not commend itself to reason. *Tully v. Elitchburg R. R. Co.*, 134 Mass. 499; *Thomp., Trials*, § 893.

INSURANCE—LIFE INSURANCE—ASSIGNMENT OF POLICY.—The plaintiff's husband took out a policy of insurance on his life, naming the plaintiff as beneficiary. He pledged this policy to the defendants as security for a loan. *Held*, that on his death the beneficiary, without repayment of the loan, can replevin the policy. *Jackson Bank v. Williams*, 26 So. Rep. 965 (Miss.). See NOTES.

INTERNATIONAL LAW—PRIZES—FISHING VESSELS.—*Held*, that coast fishing vessels employed in catching and bringing in fresh fish are exempt from seizure as prizes of war. *The Paquete Habana, The Lola*, 20 Sup. Ct. Rep. 290. See NOTES. 13 HARV. LAW REV. 594.

INTERPRETATION OF STATUTES—MARRIED WOMEN'S ACTS—EFFECT ON STATUTE OF LIMITATIONS.—*Held*, that a statute permitting married women to sue and be sued does not, by implication, repeal the clause in the statute of limitations providing that it shall not run against *femes covert*. *Butler v. Boswell*, 59 Pac. Rep. 798 (Wyo.).

The contrary doctrine proceeds on the ground that the common law incapacity of married women to sue alone was the reason for the saving clause in the statute of limitations, and that, this disability having been removed, the reason and the rule must fall together. *Brown v. Cousens*, 51 Me. 301; *Cameron v. Smith*, 50 Cal. 303. The present case maintains that an additional cause for the rule was the danger of the husband's influence over the wife, impeding the exercise of her legal rights. As this influence still exists, therefore, although the incapacity is removed, the rule cannot be impliedly



repealed. *Lindell Real Estate Co. v. Lindell*, 142 Mo. 161; *Ashley v. Rockwell*, 43 Ohio St. 386. The former view, though against the weight of authority, is more correct in theory, as the provision was probably designated to relieve cases of real disability, and not those of mere disinclination arising from marital influence.

**INTERPRETATION OF STATUTES — TAXATION — EXEMPTION.** — Under a statute exempting from taxation such college property as is "occupied by them or their officers for the purposes for which they were incorporated," *held*, that a building used for a students' dining hall, the president's house, and certain houses leased to professors for dwelling-houses are exempt. *President, etc., of Harvard College v. Assessors of Cambridge*, 55 N. E. Rep. 844 (Mass.).

The case is interesting — at least locally. The decision is fairly clear as applied to the president's house since that is largely used for administrative purposes, and the occupation of it is practically a part of the presidential duties. The building used as a dining hall is also designed for college purposes — for the accommodation of the student body. But the case is not so clear in regard to the houses of the professors. Under the same statute, houses owned by a college and rented to professors for their occupation were held not exempt. *Williams College v. Assessors of Williamstown*, 167 Mass. 505. The present case distinguishes on the ground that here the houses were used for professorial duties, and tends to a liberal construction of the statute in favor of the colleges — to exempt all college property indirectly connected with the college administration.

**PERSONS — HUSBAND AND WIFE — DEBT.** — Under a statute allowing married women to contract with their husbands, *held*, that a wife may prove a claim as creditor against her husband's insolvent estate, though she cannot maintain an action at law against her husband. *Weeks & Potter Co. v. Elliot*, 45 Atl. Rep. 29 (Me.).

The principal case is of interest because it passes upon a point not before decided under the married women's acts. In Maine and a majority of the other States, in which these acts grant to the wife the power to contract with her husband, other clauses are construed to withhold a remedy for the breach of such contracts, because of the bad policy in allowing husband and wife to be opposed to each other in actions at law. *Crowther v. Crowther*, 55 Me. 358; *Chestnut v. Chestnut*, 77 Ill. 346. *Contra*, *May v. May*, 9 Neb. 16; *Wilson v. Wilson*, 36 Cal. 447. This reason for denying the remedy applies only to actions between husband and wife personally. It is accordingly held that an action is maintainable by the wife's executor on a contract made by her with her husband. *Morrison v. Brown*, 84 Me. 82. The principal case seems sound, and reaches a satisfactory result in saving the wife from an unnecessary disadvantage as against the other creditors of her husband. See *Mayfield v. Kilgour*, 31 Md. 240.

**PERSONS — INSANITY — CONTRACT FOR NECESSARIES.** — The plaintiff's intestate, an insane person, assigned two mortgages to the defendant, as consideration for her agreement to take care of him during the rest of his life. The contract was a fair one when made, and was duly performed. In a suit by the plaintiff to have the assignment set aside, *held*, that the defendant must reassign the mortgages, but only on payment of the value of the services rendered. *Gilgallon v. Bishop*, 61 N. Y. Supp. 467 (Sup. Ct., App. Div., Third Dept.).

An insane person is everywhere held liable, whether the other party had notice or not, for the fair value of necessities furnished him. *La Rue v. Gilkyson*, 4 Pa. St. 375; *Buxter v. Earl of Portsmouth*, 2 C. & P. 178. This rule seems to have been incorrectly applied in the principal case. The contract, when made, was reasonable, the defendant's risk of loss balancing her chance of gain, since both depended on the duration of the intestate's life. In the outcome, it proved favorable to the defendant, and therefore the court allows her to keep only the actual value of her services. The better result would have been reached if the court had taken the time of entering into the contract as the time to judge of its reasonableness, and refused to disturb it, since it was entirely executed. No case directly on the point has been discovered, but in a similar case, where the contract was with an infant, the position contended for was taken. *Stone v. Dennison*, 30 Mass. 1.

**PROPERTY — EASEMENTS — WAY OF NECESSITY.** — The plaintiff divided his farm into two lots by conveying a strip of land to a railroad. Some years later a natural gas was discovered on one lot. *Held*, that the plaintiff has a way of necessity to pipe the gas across the railroad to his house on the other lot. *Uhl v. Ohio, etc., Ry.*, 34 S. E. Rep. 934 (W. Va.).

It is not clear on exactly what theory the court proceeds. Mere necessity, occurring after the grant, will not give rise to an easement. *Ellis v. Blue Mountain Assn.*, 41 Atl.

Rep. 856 (N. H.); *Morse v. Benson*, 151 Mass. 440. There is, however, a doctrine that an existing way of necessity may be used as a way for all purposes that subsequently become necessary. *Camp v. Whitman*, 51 N. J. Eq. 467; *Myer v. Dunn*, 49 Conn. 71. *Contra, London v. Riggs*, 13 Ch. D. 798. The principal case cannot rest on this theory, since a right to lay gas pipes seems hardly a legitimate incident to a right of way. Neither will the doctrine of implied reservation of quasi-easements support the result, since no such user of the land was apparent at the time of the grant. *Carbrey v. Willis*, 89 Mass. 369; *Tabor v. Bradley*, 18 N. Y. 109. Furthermore, since it does not appear that the plaintiff had absolutely no other access to his land, no real necessity is shown. It seems, therefore, impossible to support the principal case on any theory.

PROPERTY—STATUTE OF USES—RESULTING USE.—A husband purchased land with his own money, but had the conveyance made to his wife, under circumstances showing an intention to create a use in his favor. *Held*, that this resulting use is executed by the Statute of Uses, and the legal estate is vested in the husband. *Fellows v. Ripley*, 45 Atl. Rep. 138 (N. H.).

This decision follows the settled law in New Hampshire. *Osgood v. Eaton*, 62 N. H. 512. But the doctrine is utterly opposed to common law principles. It was early decided that the Statute of Uses does not execute a use upon a use. *Tyrrel's Case*, Dyer, 155 a. Hence a use limited after a conveyance, in which one use has been already declared to the grantee, is valid only in equity. *Doe v. Passingham*, 6 B. & C. 305. Since modern deeds invariably contain the declaration of a use to the grantee, the courts, in a case like the present, hold uniformly that the nominal grantee takes the legal title, subject to a resulting trust in favor of the party paying the purchase money. *Dyer v. Dyer*, 2 Cox, 92; *Guthrie v. Gardner*, 19 Wend. 414. In some states, however, these resulting trusts are specifically abolished by statute, and the estate vests absolutely in the first grantee. *Schultze v. New York City*, 103 N. Y. 307; *Campbell v. Campbell*, 70 Wis. 311. It seems better policy, if a radical change in the law is desired, to have it accomplished by legislative action rather than by judicial legislation.

QUASI-CONTRACTS—COMMON CARRIER—EXCESSIVE CHARGES.—After dispute, the plaintiff paid tolls to a navigation company, whose charter only authorized the collection of reasonable tolls. *Held*, that although the tolls were unreasonable, the excess cannot be recovered back, since no formal protest was made. *Monongahela Navigation Co. v. Wood*, 45 Atl. Rep. 73 (Pa.).

The general doctrine is that money paid to induce the performance of a duty which one has a legal right to demand can be recovered back. *Steele v. Williams*, 8 Ex. 625; *Parker v. Great Western Ry.*, 7 M. & G. 253. The absence of protest is not decisive against the plaintiff, since the defendant may nevertheless have obtained the money by what the law regards as compulsion, and it may therefore be unconscionable for him to keep it. *Lamborn v. County Comrs.*, 97 U. S. 181. In the principal case, however, the question of reasonableness being purely one of opinion, it is most probable that the money was paid as a compromise of the dispute. The absence of protest tends to strengthen this view according to which the case falls within the general rule, and there can be no recovery of the money paid, since it is not unconscionable for the defendant to abide by the results of such a compromise. *Richmond v. Union, etc., Co.*, 87 N. Y. 240.

SALES—INTOXICATING LIQUORS—SOCIAL CLUBS.—The defendant, an incorporated social club of limited membership, furnished liquor only to members of the club, for checks bought of the steward. *Held*, that the defendant is subject to the tax imposed for "selling" liquors. *United States v. Alexis Club*, 98 Fed. Rep. 725 (Dist. Ct. Pa.).

The weight of authority supports this decision. *State v. Soule*, 74 Mich. 250; *State v. Neis*, 108 N. C. 787; *Marmont v. State*, 48 Ind. 21. An opposite line of cases regards the transaction as "no more than an equitable mode by which the cost of the liquor used by members of the club is divided among them in proportion to the quantity which each member uses." *Piedmont Club v. Commonwealth*, 87 Va. 540; *Graff v. Evans*, 8 Q. B. D. 373; *Klien v. Livingston Club*, 177 Pa. St. 224. As there is here a transfer of the legal title to the liquor from the club to the individual for a money consideration, it is difficult to see what element of a sale is lacking. *Jenkins v. Brown*, 14 Q. B. 496. It may be doubtful whether these sales are within the spirit of the legislative prohibition, but this consideration seems hardly sufficient to prevent the application of the plain words of the statute. The principal case is believed to take the sounder view. See 10 HARV. LAW REVIEW, 125.



**SALES — PASSING OF TITLE — PRESUMPTION OF INTENTION.** — The plaintiff agreed to sell, and the defendant agreed to buy, a stack of hay. The stack was to be weighed, and the vendee charged accordingly. The hay was accidentally destroyed before it was weighed. *Held*, that the title had passed to the vendee, and therefore he must bear the loss. *Young v. Minker*, 59 Pac. Rep. 622 (Col., C. A.).

In order to effect a sale it is necessary that the vendor and vendee shall contemporaneously agree that the title shall pass. *Benj., Sales*, 7th ed. ch. III. It is universally held that if the price of the goods is to be determined by a subsequent ascertainment of their weight, there is a *prima facie* presumption that the parties do not intend the title to pass before the goods are weighed. *Simmons v. Swift*, 5 B. & C. 857; *Klein v. Tupper*, 52 N. Y. 550; *The Elgee Cotton Cases*, 22 Wall. 180. This presumption seems based upon an inference which is weak and conjectural. For, since both parties will usually take part in the act of weighing, there is little reason to suppose that the title to the property was intended to be in one of the parties rather than the other at the time when this act is performed. *Black, Sales*, 2d ed. 175, 242. A better view appears to be that the intention is to be ascertained, like any matter of fact, from a consideration of all the evidence in the case without the aid of any rule of presumption. This is the view of the principal case, which, though opposed to the settled law in other jurisdictions, is strongly to be commended.

**SURETYSHIP — STATUTE OF FRAUDS.** — The plaintiffs were employed by a contractor to work upon a house which the contractor was building for the defendant. The plaintiffs hesitated to go on with the work, when the defendant promised them he would see that they were paid if they would continue. *Held*, that the promise of the defendant is not within the statute of frauds. *Almond v. Hart*, 61 N. Y. Supp. 849 (Sup. Ct., App. Div., Fourth Dept.).

The promise is clearly within the terms of the statute. The court applies to the case, however, the general doctrine that it was not intended to include within the operation of the statute promises of guaranty the consideration for which moves directly from the promisee to the guarantor. As an original question this notion would appear to be quite erroneous, but it is probably finally established by the authorities. *Raabe v. Squier*, 148 N. Y. 81; *Davis v. Patrick*, 141 U. S. 479. It had its origin no doubt in a feeling that the guarantor, having received a particular benefit as a result of his promise, ought to be subjected to some liability therefor. But the proper remedy, it would seem, would have been an action in *quasi contract*. A suggestion to this effect is found in the early case of *Williams v. Leper*, 3 Burr. 1886. The objection does not go merely to the form of the action. The measure of damages in *quasi contract* would be obviously different from what it is in an action on the guaranty, so that the substantive rights of the parties are affected. The application of the accepted rule to the facts of the principal case is, however, sound.

## REVIEWS.

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